THE PROSECUTOR'S MANUAL

CHAPTER 13

RULES OF EVIDENCE

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ENACTMENT

The following rules are promulgated by the Supreme Court of Arizona and shall take effect on the first day of September, 1977. These rules apply to all actions, cases, and proceedings also apply to further procedures in actions, cases and proceedings then pending, except to the extent that application of the rules would not be feasible or would work injustice.

RULES OF EVIDENCE FOR COURTS IN THE STATE OF ARIZONA

ARTICLE I. GENERAL PROVISIONS

RULE 101. SCOPE

These rules govern proceedings in courts in the state of Arizona, with the exceptions stated in rule 1101.

Comment

These rules apply in all courts, record and nonrecord, in Arizona. Source: Federal Rules of Evidence, Rule 101.

Cross References

Amendment of pleading to conform to evidence, see A.R.S. Rules Civ. Proc., Rule 15(b).

Application to criminal actions, see A.R.S. Rules Crim. Proc., Rule 19.3.

RULE 102. PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Source: Federal Rules of Evidence, Rule 102.

NOTE: Arizona Rules of Criminal Procedure Rule 19.3(a) makes the civil rules applicable to criminal actions. Arizona Rules of Civil Procedure Rule 39(c) allows a case to be reopened at any time prior to jury arguments. Keep it in mind if you accidentally leave out an element, etc.

NOTE: Absent affirmative proof to the contrary, the appellate court presumes that the trial court only considered the competent evidence.

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State v. Allred, 134 Ariz. 274, 655 P.2d 1326 (1982). An impeaching statement which would otherwise be admissible under Rule 801(d)(1)(A) may be inadmissible due to Rule 102 considerations. Two of the objectives of Rule 102 are the ascertainment of truth and the just determination of the proceedings. "There is, we think, an inherent danger that these objectives will be

compromised when the key issue of guilt or innocence is likely to turn upon resolution of an issue of credibility in a 'swearing contest' between interested witnesses from 'opposing camps.'"

OTHER JURISDICTIONS

United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977). This rule was designed to allow FRE to expand by analogy to cover new situations.

United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977). Judge may exclude identification under Rules 102 and 403, where judge has let it in; appellate courts should be wary of reversing.

United States v. Thorne, 547 F.2d 56 (8th Cir. 1976). Where state's chief witness had gone to school for M.A. and became the head of a drug program, it was proper for the court to hold that he had rehabilitated himself and thereby exclude evidence of his 1973 prior.

RULE 103. RULINGS ON EVIDENCE

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the
evidence, the form in which it was offered, the objection made, and the ruling thereon. it may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Fundamental error. Nothing in this rule precludes taking notice of errors affecting fundamental rights although they were not brought to the attention of the court.

Source: Federal Rules of Evidence, Rule 103 (modified).

Cross References

Harmless error, see A.R.S. Rules Civ. Proc., Rule 61.

Exception unnecessary, see A.R.S. Rules Civ. Prov., Rule 46.

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State v. Mills, 196 Ariz. 269, 995 P.2d 705 (App. 1999). A trial court's ruling on admissibility of evidence will only be altered by appellate courts if there is an abuse of discretion. See also *State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992) and *State v. Stotts*, 144 Ariz. 72, 695 P.2d 1110 (1985).

State ex rel Collins v. Seidel, 142 Ariz. 587, 691 P.2d 678 (1984). Rules of evidence are considered to be procedural in nature.

I WAIVER

State v. Walker, 181 Ariz. 475, 481, 891 P.2d 942, 948 (App. 1995). Failure to assert a specific objection that a witness' testimony was impermissible evidence of a drug courier profile lead to the issue being waived even though defendant had raised a more general objection at trial.

State v. Hamilton, 177 Ariz. 403, 408-09, 868 P.2d 986, 991-92 (App. 1993). Defendant's general objections to expert testimony, including "hearsay, improper foundation, and relevancy", were not enough to preserve the more specific issues that defendant raised on appeal: "(1) that Dr. Boychuk was not a qualified expert, (2) that child abuse accommodation syndrome is not a proper subject for expert testimony, and (3) that the probative value of the testimony was outweighed by its prejudicial effects."

State v. Hernandez, 170 Ariz. 301, 306-07, 823 P.2d 1309, 1314-15 (App. 1991). Where defense counsel objected to testimony based on one ground, hearsay, they waived the assertion of other grounds for appeal regarding the testimony.

State v. Lopez, 170 Ariz. 112, 118, 822 P.2d 465, 472 (App. 1991). When an objection, that the cross-examination of an expert witness went beyond the scope of what was permissible, was not made, the issue was waived.

State v. Cook, 170 Ariz. 40, 58, 821 P.2d 731, 750 (1991). When the issue of how a plea agreement affected the testimony of a witness was not raised at trial it was waived for the purposes of appeal.

State v. Hauss, 142 Ariz. 159, 166, 688 P.2d 1051, 1058 (App. 1984). Appellant's argument that blood group sample should be inadmissible because the state did not preserve the evidence was waived because it was not raised at trial.

State v. Garcia, 141 Ariz. 97, 685 P.2d 734 (1984). Failure to object to closing arguments at trial waives the objection on appeal.

State v. Mova, 140 Ariz. 508, 683 P.2d 307 (App. 1984). Defendant failed to object to the trial court's giving of two forms of guilty verdict, no fundamental error was found, therefore, the defendant waived his right to appeal the two forms.

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983). Failure to object to incriminating statements before the statements are admitted does not preclude defendant from objecting to the statements for the purpose of proving corpus delicti.

State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983). The defendant did not waive his right to appeal prosecutor's statements about his post arrest silence by his failure to object to statements during

trial.

State v. Linden, 136 Ariz. 129, 664 P.2d 673 (App. 1983). Improper remarks must be objected to or the right is waived on appeal.

State v. Grilz, 136 Ariz. 450, 666 P.2d 1059 (1983). Defendant waives any error based upon a jury instruction by failing to object to it**,** unless there is fundamental error.

State v. Hall, 138 Ariz. 482, 675 P.2d 1301 (1983) cert. denied 104 S.Ct. 3519. Failure to object to venue before the trial waives the issue on appeal.

State v. Thompson, 138 Ariz. 341, 674 P.2d 895 (App. 1983). Defendant failed to object to Intoxilyzer's calibration, therefore, he waived that issue on appeal.

State v. Harding, 137 Ariz. 278, 670 P.2d 383 (1983) cert. denied 104 S.Ct. 1017. Defendant waived objection to admittance of photos of the victim, no fundamental error, waiver valid.

State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (1982). "If evidence is objected to on one ground and admitted over the objection, other grounds not specified are waived."

State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982). Where defendant not only failed to object to hearsay testimony, but also opened the door to the line of questioning, he could not raise the issue on appeal. "When counsel opens the whole field of inquiry, he cannot assign its fruits as error on appeal."

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). Testimony regarding the victim's good character was irrelevant and it was error to admit it since self-defense was not raised at trial and there was no evidence that the victim was the first aggressor. However, two previous witnesses had already testified on the issue without objection so there was no prejudice.

State v. Washington, 132 Ariz. 429, 646 P.2d 314 (App. 1982). At an armed robbery trial, the defendant made a hearsay objection to testimony about the bait bill from the cash drawer and a lack of foundation objection to the introduction of the receipt. The objection to the bait bill was properly overruled because the officer only testified as to his personal observations. The receipt was hearsay, but the earlier hearsay objection to the bait bill "did not preserve any error regarding the possible hearsay nature of the receipt." Finally, the trial court did not abuse its discretion in admitting the receipt on the sufficiency of foundation basis.

State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981). Failure to make a timely, specific objection waives all but fundamental error on appeal.

State v. Viertel, 130 Ariz. 364, 636 P.2d 142 (App. 1981). Failure to make proper objection at trial waives all but fundamental error on review.

State v. Miller, 129 Ariz. 42, 628 P.2d 590 (App. 1981). Isolated, non-responsive answer relating to defendant's refusal to answer questions was not fundamental error. No objection was made, so the issue was waived on appeal.

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). Assigning different grounds for objection on appeal waives all but fundamental error.

State v. Verive, 128 Ariz. 570, 627 P.2d 71 (App. 1981). Mere mention of "mug shot" by a non-

police witness does not equal fundamental error. Defense neither objected, moved to strike, nor requested any curative instruction, so the issue was waived on appeal.

State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (App. 1981). Objection to question regarding witness' fear of defendant did not preserve for review alleged error regarding the separate subject of the witness receiving anonymous threatening phone calls.

State v. Smith, 122 Ariz. 50, 592 P.2d 1316 (App. 1979). Failure to object to admission of evidence at trial waives issue on appeal.

II. FUNDAMENTAL ERROR

State v. Lopez, 217 Ariz. 433, 434-38, 175 P.3d 682, 683-87 (App. 2008). Rape victim's statements to the nurse examining and treating her were relevant to her treatment and thus it was not error, much less fundamental error, to admit them as evidence.

State v. Henderson, 210 Ariz. 561, 567, 115 P.3d 601, 607 (2005). "Fundamental error review . . . applies when a defendant fails to object to alleged trial error. . . . To prevail under this standard of review, a defendant must establish both fundamental error exists and that the error in his case caused him prejudice."

State v. Henderson, 210 Ariz. 561, 568, 115 P.3d 601, 608 (2005). Because the judge instead of jury found aggravating facts used to impose super-aggravated sentence, fundamental error was found.

State v. Rutledge, 205 Ariz. 7, 14, 66 P.3d 50, 57 (2003). It was not fundamental error for a prosecutor, in closing statements, to refer to defendant's unwillingness to give detective the names of alibi witnesses in a videotaped interview because prosecutor was not commenting on defendant's silence at trial.

State v. Walker, 181 Ariz. 475, 481-82, 891 P.2d 942, 948-49 (App. 1995). It was not fundamental error to admit police testimony as to the general behavior of drug couriers because this testimony had no more than a neutral effect at trial.

State v. Cornell, 179 Ariz. 314, 330, 878 P.2d 1352, 1368 (1994). Remarks by the prosecutor during trial that defendant would be set free if found not guilty by reason of insanity was not fundamental error because "the weight of the evidence against Defendant would have resulted in his conviction with or without these remarks."

State v. Libberton, 141 Ariz. 132, 685 P.2d 1284 (1984). No fundamental error exists where mention of defendant's leaving the work furlough program alluded to his prior convictions because defense counsel elicited the line of questions.

State v. Kinkade, 140 Ariz. 91, 680 P.2d 801 (1984). Trial court failed to read jury instruction on reasonable doubt at end of trial. This was not fundamental error because the jury was instructed on reasonable doubt at the beginning of trial.

State v. Yslas, 139 Ariz. 60, 676 P.2d 1118 (1984). The Supreme Court is required to review and reverse a case if there is a fundamental error which prejudiced the defendant.

State v. Garcia, 141 Ariz. 97, 685 P.2d 734 (1984). Prosecutor's remarks expressing his opinion that the

defendant was guilty was improper but did not constitute fundamental error.

State v. Roberts, 138 Ariz. 230, 673 P.2d 974 (App. 1983). State did not prove that defendant wrongfully obtained aid for dependent children and defendant did not move for acquittal. However, it is fundamental error to convict without sufficient evidence; there was no waiver.

State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983). Prosecutor's statements on defendant's post-arrest silente were fundamental error, therefore defendant could not waive his right to object to them.

State v. Huffman, 137 Ariz. 300, 670 P.2d 405 (App. 1983). Jury instruction that driving under the influence was inherently dangerous was not fundamental error for allegedly alleviating state's burden of proof.

State v. Van Alcorn, 136 Ariz. 215, 665 P.2d 97 (App. 1983). After finding out what his sister told police, the defendant changed his defense to a rape charge from alibi to consent. It was not fundamental error for the prosecutor to say that the defendant's sister would not confirm the defendant's initial story.

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982). Although the Arizona Rule is that if hearsay evidence is admitted without objection, it becomes competent evidence for all purposes, "if the admission of hearsay evidence amounts to fundamental error in a criminal case, we will reverse even if the defendant has failed to object to its admission."

III. OVERRULED OBJECTION NEED NOT BE REPEATED AT EVERY SUBSEQUENT REFERENCE

State v. Leyvas, 221 Ariz. 181, 189, 211 P.3d 1165, 1173 (App. 2009). Issue of whether a witness should be allowed to make an in-court identification was preserved by a defendant's pre-trial motion in limine even though defendant failed to object contemporaneously with the in-court identification.

State v. Anthony, 218 Ariz. 439, 445-46, 189 P.3d 366, 372-73 (2008). Defendant did not object to DNA evidence or final arguments of the state at trial, but had previously filed a motion in limine and had orally argued that motion before the court, which preserved the issue for appeal.

State v. King, 213 Ariz. 632, 636-37,¶ 16, 146 P.3d 1274, 1278-79 (App. 2006). Though his trial objection to the evidence was based on other grounds, defendant did not waive issue of admissibility of prior convictions and Motor Vehicle Department record based on confrontation clause because defense counsel filed a pre-trial motion to suppress this evidence based on the confrontation clause.

State v. Sharp, 193 Ariz. 414, 422, 973 P.2d 1171, 1179 (1999). Even though the trial court denied defendant's motion to suppress evidence of pornographic magazines found in his hotel room, the motion preserved this issue for appeal despite the fact that defendant did not object to the evidence at trial.

State v. Burton, 144 Ariz. 248, 697 P.2d 331 (1985). Once a pre-trial motion has been made and rejected, the defendant does not have to continually object.

State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (App. 1982). The defendant objected to the first mention of the prior bad act and immediately moved for a mistrial asserting the same grounds later asserted on appeal. "While he did not continue to object to every subsequent reference to the baseball bat incident, we conclude that his motion for a mistrial was sufficient to preserve the issue for purposes of appeal."

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). An objection to a certain class of evidence, when overruled, is treated as a continuing objection and need not be repeated as to that class of evidence.

IV. STRATEGY CHANGE

State v. Robles, 135 Ariz. 92, 659 P.2d 645 (1983). Decision to waive mistrial after the defendant's mother testified that the defendant had been previously incarcerated was merely a strategy choice and does not constitute ineffective assistance of counsel.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982), Quoting *State v. Ellerson,* 125 Ariz. 249, 251, 609 P.2d 64, 66 (1980), the court held that the defendant's motion *in limine*, which was denied, was sufficient to preserve the issue of admissibility on appeal and that "a party should not necessarily lose his right to appeal a ruling because he alters his strategy in response to a trial court's finding against him."

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). "Once an objection has been made and overruled, defense counsel must attempt as best he can to minimize any harm that might flow from the erroneous admission of unfavorable evidence. To do so by asking a question concerning the objected-to evidence does not thereby waive the objection."

V. PRESERVATION OF ISSUE BY MOTIONS

A. MOTION FOR MISTRIAL

State v. Felix, 214 Ariz. 110, 112, ¶ 9, 149 P.3d 488, 490 (App. 2006). A trial error that amounts to double jeopardy can be preserved either by making a claim in the trial court at an appropriate time, or through a motion for mistrial. See also *State v. Moody*, 208 Ariz. 424, ¶¶ 19-21, 94 P.3d 1119, 1132-33 (2004).

State v. Mills, 196 Ariz. 269, 272, ¶ 13, 995 P.2d 705, 708 (App. 1999). During his oral motion for mistrial, Defendant did not raise the issue of having been in shackles while in front of the jury, and so the issue was not preserved for appeal.

State v. Pool, 139 Ariz. 98, 677 P.2d 261 (1984). Trial court has discretion to declare a mistrial.

State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (App. 1982). "While he did not object to every subsequent reference to the baseball bat incident, we conclude that his motion for mistrial was sufficient to preserve the issue for purposes of appeal."

B. MOTION IN LIMINE

State v. Leyvas, 221 Ariz. 181, 189, 211 P.3d 1165, 1173 (App. 2009). Issue of whether a witness should be allowed to make an in-court identification was preserved by Defendant's pre-trial motion *in limine* even though defendant failed to object contemporaneously with the in-court identification.

State v. Anthony, 218 Ariz. 439, 445-46, 189 P.3d 366, 372-73 (2008). Defendant did not object to DNA evidence or final arguments of the state at trial, but had previously filed a motion in limine and had orally argued that motion before the court, and so he preserved the issue for appeal.

State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986). Experts can not testify as to the credibility of the witness'

testimony.

State v. Via, 146 Ariz. 108, 704 P.2d 238, (1985). A doctor was properly barred from testifying that 14 out of 15 total strangers would have picked the defendant from the lineup.

State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983). The state's motion *in limine* was properly granted to preclude the expert's testimony concerning whether the defendant was acting "reflectively," "compulsively", "without premeditation," "fearfully," or "intoxicated."

State v. Madsen, 137 Ariz. 16, 667 P.2d 1342 (App. 1983). The state's motion *in limine* was properly granted to exclude defendant's prior sexual and family history because it was irrelevant to the child molestation charges.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). The court held that defendant's motion *in limine,* which was denied, was sufficient to preserve the issue of admissibility on appeal.

VI. "OPENING THE DOOR"

State v. Leyvas, 221 Ariz. 181, 188-89, ¶ 25, 211 P.3d 1165, 1172-73 (App. 2009). Defense opened the door to the witness's in-court identification, making it invited error and not reversible on appeal.

State v. Leon, 190 Ariz. 159, 163, 945 P.2d 1290, 1294 (1997). When one side introduces evidence that is improper or irrelevant, they have opened the door and the other party can respond with either comments or other related evidence.

Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984). Although the defense had "opened the door" to some irrelevant areas, it was improper for the prosecutor to speculate on what type of witness would invoke the Fifth Amendment.

State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982). Where defendant not only failed to object to hearsay testimony, but also opened the door to the line of questioning, he could not raise the issue on appeal. "When counsel opens the whole field of inquiry, he cannot assign its fruits as error on appeal."

VII. OFFER OF PROOF

State v. Towery, 186 Ariz. 168, 177, 920 P.2d 290, 299 (1996). It may be error to exclude a codefendant's testimony showing bias even if Defendant does not provide an offer of proof, if the questions asked have a clear purpose.

State v. Hill, 174 Ariz. 313, 329, 848 P.2d 1375, 1392 (1993). After the trial court excluded what might have been mitigating information, Defendant failed to make an offer of proof, and so on appeal the trial court's ruling could not be reversed.

State v. Bay, 150 Ariz. 112, 722 P.2d 280 (1986). Ordinarily, failure of defendant to make an offer of proof after evidence has been excluded waives the issue. Here, the court practice was to hear offers of proof in chambers without a court reporter. This was not proper procedure, therefore, defendant's complaint about exclusion of evidence was reviewable even though there was no record.

State v. Wilson, 128 Ariz. 422, 626 P.2d 152 (App. 1981). An offer of proof is necessary when the testimony which is to be brought out is not obvious.

VIII. IMPORTANCE OF RECORD

State v. Lopez, 217 Ariz. 433, 434-35, 175 P.3d 682, 683-84 (App. 2008). If a party fails to properly object to an issue at trial, that issue is not preserved for appeal except for review for fundamental error.

State v. DeBoucher, 135 Ariz. 220, 660 P.2d 471 (1982). Defendant could not assert error in the exclusion of an inspection report which occurred during an off-the-record bench conference since there was no record of the issue to review.

IX. HARMLESS ERROR

State v. Atwood, 171 Ariz. 576, 639, 832 P.2d 593, 656 (1992). While the trial court erred in not making a limiting instruction to the jury regarding prior bad act evidence, it was only harmless error because the court did not feel that the jury's verdict would have been different.

State v. Hein, 138 Ariz. 360, 674 P.2d 1358 (1983). Even if the defendant's constitutional rights are violated, reversal is not required if it can be determined beyond a reasonable doubt that the jury verdict would be the same.

State v. Thomas, 133 Ariz. 533, 652 P.2d 1380 (1982). The testimony of the hypnotized witness was merely cumulative of all testimony that convicted defendant. Therefore, the verdict would have been the same with or without the hypnotized witness' testimony.

OTHER JURISDICTIONS

United States v. Phillips, 596 F.3d 414, 416-17 (7th Cir. 2010). Defendant who objected to a recording on one ground did not preserve for appeal that recording should be inadmissible on other grounds.

United States v. Johnson, 535 F.3d 892,898 (8th Cir. 2008). Admission of hearsay was harmless error because the declarant testified and could be cross-examines.

United States v. Jumper, 497 F.3d 699, 703-704 (7th Cir. 2007). Where defense filed a motion *in limine* to exclude parts of a videotaped statement that defendant made to the police, and defense incorporated this into their objection at trial, defense had preserved the issue for appeal.

United States v. Crockett, 435 F.3d 1305, 1311-12 (10th Cir. 2006). For an offer of proof to be adequate, it must say why the evidence is admissible.

United States v. Brown, 303 F.3d 582, 600 (5th Cir. 2002). Even though defense did not provide a written offer of proof, the issue was still preserved for appeal because "defense counsel provided the court with an adequate oral description" of the testimony to be offered.

United States v. Adams, 271 F.3d 1236, 1241 (10th Cir. 2001). An offer of proof must "first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence".

United States v. Shay, 57 F.3d 126, 135 (1st Cir. 1995). Defendant could not appeal the trial court's decision to exclude part of witness's testimony when defense did not adequately inform the trial court of the substance of the excluded testimony.

United States v. Johnson, 585 F.2d 119 (5th Cir. 1978). Defendant failed to preserve any error, so challenge to evidence exclusion failed.

United States v. Gresham, 585 F.2d 103 (5th Cir. 1978). Rule 103 operates to waive the refusal to hold a voluntariness hearing on a second confession.

United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). 103(c): Evidence that defendant refused to consent to search should be excluded.

United States v. Micklus, 581 F.2d 612 (7th Cir. 1978). 103(a): It is proper to bar questions about where defense witness acquired the knife he allegedly used in rape of defendant, in defendant's escape trial.

United States v. Ruffin, 575 F.2d 346 (2nd Cir. 1978). 103(a)(1): Objection to computer printout as irrelevant waived hearsay objection which wasn't raised.

United States v. Mangan, 575 F.2d 32 (2nd Cir. 1978). 103(a)(1): Failure to object that statements were not in furtherance of conspiracy waived the issue.

United States v. Madera, 574 F.2d 1320 (5th Cir. 1978). 102(a)(1): In the face of overwhelming evidence, error in admitting phone directories to show non-existence of business was harmless.

United States v. Long, 574 F.2d 761 (3rd Cir. 1978). 103(a): Conversation with defendant about payoffs harmless here.

United States v. Bell, 573 F.2d 1040 (8th Cir. 1978). 103(a): Undercover agent's testimony about purpose of gun control act harmless.

United States v. Shields, 573 F.2d 18 (10th Cir. 1978). 103(d): Objection to failure to exclude gun was waived, as no motion to suppress was made.

United States v. Blackshear, 568 F.2d 1120 (5th Cir. 1978). 103(a): Where the defense raises no objection to prior waived error, the court is not required to construct argument that Rule 609 was violated on behalf of defendant.

United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977). 103(c): Questioning about details of other dismissed priors was not reversible in light of record and court's instructions.

United States v. Nace, 561 F.2d 763 (9th Cir. 1977). 103(c): Witness' statement that a co-defendant put a contract on the witness was cured by proper instruction, mistrial unnecessary.

United States v. Davis, 557 F.2d 1239 (8th Cir. 1977). 103(a)(1): Failure to object waived error in admitting evidence of deed to house, money, and $100 bill used in DEA buy.

United States v. Kopel, 552 F.2d 1265 (7th Cir. 1977). Failure to object to including *Miranda* warnings in part of grand jury transcript read to jury waived any error.

United States v. Jameson, 549 F.2d 1263 (9th Cir. 1977). Even improper testimony (hearsay here) introduced without objection becomes part of record and may be argued.

United States v. Latimer, 548 F.2d 311 (10th Cir. 1977). Failure to object when judge questions defendant's witness waives all but fundamental error.

RULE 104. PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or may admit it subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Source: Federal Rules of Evidence, Rule 104.

Cross Reference

Mode and order of interrogation of witnesses and presentation of evidence, see Rule 611.

NOTE: Consider Rule 104(d), which gives defendant a special privilege that no other witness gets (limited cross-examination), then consider A.R.S. § 13-117(A) which states that if a defendant "offers himself as a witness [in a criminal action or proceeding] in his own behalf, he may be cross-examined to the same extent and subject to the same rules as any other witness." (emphasis supplied)

ARIZONA CASES

I. DISCRETION OF TRIAL COURT

State v. Lundstrom, 161 Ariz. 141, 146, 776 P.2d 1067, 1072 (1989). "The question of whether an expert relied on out-of-court material and if that reliance is reasonable is one within the trial court's discretion."

State v. Corrales, 138 Ariz. 583, 676 P.2d 615 (1983). Trial court has discretion to exclude testimony from witnesses and to force the witness to invoke the Fifth Amendment.

State v. Ashelmen, 137 Ariz. 460, 671 P.2d 90 (1983). Foundation for evidence may be established by chain of custody or identification testimony and there was sufficient identification testimony for the knife and umbrella, even though the umbrella had been forgotten in the police officer's office for 4 months.

State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981). Determination of foundational requirements

for admissibility of admission of declaration is within the discretion of the trial court.

II. COURT NOT BOUND BY RULES OF EVIDENCE WHEN DETERMINING PRELIMINARY QUESTIONS

State v. Edwards, 136 Ariz. 177, 665 P.2d 59 (1983). Hearsay rules are not relevant where the court is deciding preliminary questions concerning admissibility of evidence.

State v. Simmons, 131 Ariz. 482, 642 P.2d 479 (1982). A court determining preliminary questions concerning the admissibility of evidence, including documentary evidence, is not bound by the Rules of Evidence, Rule 104(a). Arizona Rules of Evidence, 17 A.R.S. The court may therefore receive reliable hearsay to authenticate documents.

State v. Hadd, 127 Ariz. 270, 619 P.2d 1047 (1980). It is not improper for judge to listen to a tape recording at the suppression hearing prior to its admission. "In a court hearing, a liberal practice in the admission of evidence is followed supported with a presumption on appeal that the judge below, knowing the applicable Rules of Evidence, will not consider matters which are inadmissible when making his findings."

State v. Spratt, 126 Ariz. 184, 613 P.2d 848 (1980). It is not error for trial court to allow hearsay evidence as to a witness' unavailability prior to admitting a deposition.

III. ADMISSIBILITY OF CO-CONSPIRATORS' STATEMENTS

State v. Dunlap, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996). "When inquiring whether a statement of a co-conspirator was made in furtherance of the conspiracy, courts focus on the intent of the co-conspirator in advancing the goals of the conspiracy, not on whether the statement has the actual effect of advancing those goals."

State v. Martin, 139 Ariz. 466, 679 P.2d 489 (1984). Out-of-court statements of co-conspirators were admissible even if state failed to show unavailability of one co-conspirator because the statements gave background information and were not crucial to the State's case.

State v. Nightwine, 137 Ariz. 499, 671 P.2d 1289 (App. 1983). Taped co-conspirators' statements were admissible because they mentioned the object of the conspiracy (cocaine) and they were in furtherance of the conspiracy.

State v. Lycett, 133 Ariz. 185, 650 P.2d 487 (1982). The standard for the admission of co-conspirators' statements under Rule 801(d)(2)(E) is "'sufficient reliable evidence of a conspiracy,'" not proof of the conspiracy by a preponderance of the evidence. The trial court alone determines the admissibility of co-conspirators' statements and does not have to instruct the jury beforehand to disregard the statements unless they are satisfied the state has proven the conspiracy by independent evidence.

OTHER JURISDICTIONS

United States v. Velasquez, 64 F.3d 844, 849 (3rd Cir. 1995). The district court need to find preliminarily find the requirements for expert witnesses (Fed.Rules Evid.Rule 702) in order to determine that their testimony should be allowed.

United States v. Gambino, 926 F.2d 1355, 1361 (3rd Cir. 1991). The statements of a co-conspirator can

be used to prove that a conspiracy exists.

United States v. Brewer, 947 F.2d 404, 410 (9th Cir. 1991). "The application of Rule 615 to a motion to suppress evidence is not affected by Rule 104."

Bourjaily v. United States, 107 S.Ct. 2775 (1987). Rule 104(a) allows the use of a co-conspirator's statement to help prove existence of conspiracy.

United States v. Andrews, 585 F.2d 961 (10th Cir. 1978). Test to admit conspirator's statements: Is it more likely than not declarant was conspirator and statements were in furtherance? Statements may be admitted prior to foundation being laid.

United States v. Enright, 579 F.2d 980 (6th Cir. 1978). Preponderance test proper for co-conspirator's statements, use of *prima facie* standard harmless here since defendant agreed.

United States v. Smith, 578 F.2d 1227 (8th Cir. 1978). Judge alone determines admissibility of co-conspirator's statements.

United States v. Ruffin, 575 F.2d 346 (2nd Cir. 1978). Hindsight testimony irrelevant and properly excluded.

United States v. Strand, 574 F.2d 993 (9th Cir. 1978). Accepting government's version of facts, statements weren't excited utterance.

United States v. Peele, 574 F.2d 489 (9th Cir. 1978). 104(c): Allowing suggestiveness of newspaper story on witness to wait for cross-examination was proper, hearing outside presence of jury is necessary only if grave doubt about admissibility of evidence exists.

United States v. Caro, 569 F.2d 411 (5th Cir. 1978). 104(a): Traditional standard of instructions for jury on co-conspirator's statements sufficient.

United States v. Lyon, 567 F.2d 777 (8th Cir. 1977). Competency of witness is for the court to decide.

United States v. Thomas, 567 F.2d 638 (5th Cir. 1978). Statements in front of DEA agents sufficient to establish *prima facie* conspiracy.

United States v. Tenorio, 565 F.2d 943 (5th Cir. 1977). 104(a): Failure to observe harmless in light of independent evidence of conspiracy.

United States v. Ochoa, 564 F.2d 1155 (5th Cir. 1977). 104(a): Unnecessary to review whether sufficient evidence of conspiracy to use co-conspirator's statements existed, defendant didn't object to use of statements.

United States v. Martano, 557 F.2d 1 (1st Cir. 1977). Judge determines whether conspiracy exists to admit co-conspirator's statements, and in doing so, he may use inadmissible evidence, perhaps including hearsay statement to be admitted. See *Hassell, infra*.

United States v. Stearns, 550 F.2d 1167 (9th Cir. 1977). Admission of photos taken from defendant without limiting instruction since foundation wasn't established was error; harmless where foundation later established.

United States v. Pensinger, 549 F.2d 1150 (8th Cir. 1977). Testimony of ex-wife about conversations prior to marriage and during marriage when another couple was present are admissible.

United States v. De La Fuente, 548 F.2d 528 (5th Cir. 1977). "[S]uppression hearings are not to be conducted under strict evidence rules." Here another cop's hearsay statement should have been admitted.

RULE 105. LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Source: Federal Rules of Evidence, Rule 105.

ARIZONA CASES

State v. Lee, 189 Ariz. 590, 600, 944 P.2d 1204, 1214 (1997). Error of not severing certain charges from each other was harmless because jurors were told they had to find each of the elements of each of the charges beyond a reasonable doubt.

State v. Hyde, 186 Ariz. 252, 276-77, 921 P.2d 655, 679-80 (1996). The trial court offered defendant a limiting instruction regarding evidence of his child support arrearages, but defendant did not request the offered instruction, so it was not an abuse of discretion to admit the evidence.

State v. Lawson, 144 Ariz. 547, 698 P.2d 1266 (1985). Co-defendant's statements are admissible as long as there is an opportunity to cross-exam. If there are antagonistic defenses then the trials should be severed.

State v. Cannon, 148 Ariz. 72, 713 P.2d 273 (1985). Jurors could be instructed to consider a tape recorded confession to determine if the confession was true and voluntary and not as substantive evidence that defendant committed other crimes.

OTHER JURISDICTIONS

United States v. Fowler, 535 F.3d 408, 421-22 (6th Cir. 2008). Error in not providing a limiting instruction telling jury that certain evidence against a co-defendant could not be used against defendant was harmless because the evidence did not implicate defendant and other evidence against defendant was compelling.

United States v. Beasley, 495 F.3d 142, 150-51 (4th Cir. 2007). The trial court met its obligation to give a limiting instruction even though it gave that instruction at the conclusion of the trial instead of contemporaneously with the introduction of the evidence.

United States v. Brawner, 32 F.3d 602, 604-07 (D.C.Cir. 1994). When prior bad acts evidence is introduced by the defense the trial judge does not need to give the jury a limiting instruction unless it is requested by the defense.

United States v. Werme, 939 F.2d 108, 114-16 (3rd Cir. 1991). Where the defendant asked for a limiting instruction for evidence presented regarding a co-conspirator the trial court erred in not providing such an instruction. However, it was harmless error because it was highly probable that it did not substantially affect the defendant's rights.

United States v. Cooper, 577 F.2d 1079 (6th Cir. 1978). Failure to *sua sponte* give limiting instruction was not error.

United States v. McLennan, 563 F.2d 942 (9th Cir. 1977). Although instruction limiting evidence to intent issue could have been given, failure to request it meant it wasn't plain error.

Durns v. United States, 562 F.2d 542 (8th Cir. 1977). *Sua sponte* limiting instruction rendered appellate argument that the jury speculated appellant was one of parties on tape without merit.

United States v. Garcia, 530 F.2d 650 (5th Cir. 1976). Failure to give limiting instruction on impeachment material is fundamental error only if testimony is extremely damaging.

United States v. Conley, 523 F.2d 650 (8th Cir. 1975), cert. denied 96 S.Ct. 1125 (1975). Failure to instruct jury on limited purpose evidence of other crimes was properly admitted, absent specific defense request, where evidence relevant.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Source: Federal Rules of Evidence, Rule 106.

NOTE: If a defense attorney attempts to impeach a witness on the basis of his notes of what the witness said, consider *Black v. State,* 116 Ariz. 234, 568 P.2d 1132 (App. 1978), a civil case where a defense attorney was properly prevented from impeaching a witness from his notes. Although the notes in that case were three years old, an argument can be made that the defense attorney is an interested party, not a disinterested court reporter, and if he wants to impeach he should be required to do so from the record.

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State v. Cruz, 218 Ariz. 149, 162,¶¶ 57-8, 181 P.3d 196, 209 (2008). The court did not err in excluding a potentially exculpatory statement because it did not "qualify, explain or place into context" the inculpatory statement. [internal quotations omitted].

State v. Ellison, 213 Ariz. 116, 130-31, ¶¶43-7, 140 P.3d 899, 912-14 (2006). Trial judge did not err in ruling that if defense elicited statements regarding part of an accomplice's conversation the prosecution could ask about statements made later in the conversation.

State v. Prasertphong, 210 Ariz. 496, 498-502, ¶¶ 10-23, 114 P.3d 828, 830-34 (2005). It was not a violation of the confrontation clause to introduce the entirety of a statement when the defense had previously tried to introduce only select parts of that statement, which by themselves, may have mislead the jury.

State v. Hughes, 189 Ariz. 62, 72-3, 938 P.2d 457, 467-68 (1997). After the state introduced an

excerpt from one of the victim's letters, the court did not err in excluding the defense form introducing the rest of the letter and two other letters because the information contained in them was irrelevant.

State v. Dunlap, 187 Ariz. 441, 454-455, 930 P.2d 518, 531-32 (App. 1996). "The rule does not require the adverse party to introduce the excluded portions immediately after introduction of the portions of the writing by the first party."

State v. Briston, 130 Ariz. 380, 636 P.2d 628 (1981). Since lie detector evidence is inadmissible unless there is a stipulation, it was proper for the court to delete portions of defendant's statements in which he offered to take a lie detector test.

State v. Passarelli, 130 Ariz. 360, 636 P.2d 138 (App. 1981). It was not error to admit front page only of truck rental agreement and insurance contract since back page contained only boilerplate explanation of the agreements and defendant had the original contract. "The 'fairness' requirement of Rule 106 therefore seems not to have been abused by the admission of the front page, since appellant could have introduced the entire contract himself."

OTHER JURISDICTIONS

United States v. Phillips, 543 F.3d 1197, 1203 (10th Cir. 2008). It was not error for the court to admit only part of a document when the adverse party did not offer the rest of the document into evidence.

United States v. Ramos-Caraballo, 375 F.3d 797, 802-05 (8th Cir. 2004). The district court erred in admitting full transcripts of an officer witness's prior statements because only parts of the statements were needed to put the officer's testimony into context.

United States v. Branch, 91 F.3d 699, 727-29 (5th Cir. 1996). It was not an abuse of discretion for district court to exclude exculpatory parts of an investigator's report because the defense failed to show that those parts would help put the rest of the report and investigator's testimony into context or qualify or explain post arrest statements that defendant made to investigator.

United States v. Li, 55 F.3d 325, 329-30 (7th Cir. 1995). "A trial judge need not admit every portion of a statement but only those needed to explain portions previously received."

United States v. Velasco, 953 F.2d 1467, 1474-75 (7th Cir. 1992). "Our case law interpreting Rule 106 requires that the evidence the proponent seeks to admit must be relevant to the issues of the case. Even then a trial judge need admit only that evidence which qualifies or explains the evidence offered by the opponent."

United States v. Jamar, 561 F.2d 1103 (4th Cir. 1977). It was proper to introduce only transcript of defendant's statements at preliminary hearing in his prosecution for perjury, rule is for putting parts in context, not as a substitute for introducing evidence.

United States v. Davis, 546 F.2d 573 (5th Cir. 1977). It is not error to exclude defendant's prison record showing rehabilitation progress when defense to escape charge is coercion.

ARTICLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) *Scope of rule*. This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts*. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary*. A court may take judicial notice, whether requested or not.

(d) *When mandatory*. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard*. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice*. Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury*. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Source: Federal Rules of Evidence, Rule 201, (modified).

Civ.Code 1913, §§1916, 1946.

Rev.Code 1928, §4453.

Code 1939, §23-304.

Rules Civ.Proc., former Rules 44(o), 44(p).

Cross Reference

Justice of the peace, instructing jury as to law, see §22-211.

ARIZONA CASES

I. RELEVANCE REQUIREMENT

State v. Corrales, 131 Ariz. 471, 641 P.2d 1315 (App. 1982). "Although Rule 201, Arizona Rules of Evidence, 17A A.R.S., contains no express requirement that judicially noticed facts be relevant, it is ludicrous to suggest otherwise. Facts judicially noticed become evidence in the case, and are therefore subject to the requirement of relevance embodied in Rule 402."

II. JUDICIAL NOTICE BY APPELLATE COURT

In re Sabino R., 198 Ariz. 424, 425, 10 P.3d 1211, 1212 (App. 2000). If trial court was never asked to take notice, appellate court still may take notice if the trial court could have.

State v. Bayliss, 146 Ariz. 218, 704 P.2d 1363 (App. 1985). There is not problem with the appellate court taken judicial notice even if the trial court was not requested to do so.

State v. McGuire, 124 Ariz. 64, 601 P.2d 1348 (App. 1978). "An appellate court can take judicial notice of any matter of which the trial court may take judicial notice, even if the trial court was never asked to do so."

III. EXAMPLES OF PROPERLY NOTICED FACTS

In re Sabino R., 198 Ariz. 424, 425, 10 P.3d 1211, 1212 (App. 2000). The juvenile court could have taken notice that party was under the age of 21 and so it is proper that the appellate court took notice of this.

In re Anthony H., 196 Ariz. 200, 202-03, 994 P.2d 407, 408-09 (App. 1999) quoting State v. Lynch, 115 Ariz. 19, 22, 562 P.2d 1386, 1389 (1977). If a fact is so "notoriously true as not to be subject to reasonable doubt", judicial notice of that fact is proper. [internal quotations omitted].

State v. Lulan, 139 Ariz. 236, 677 P.2d 1344 (App. 1984). For drunk driving case, court properly took judicial notice of the Department of Health's rules and regulations for determination of blood alcohol content.

State ex rel Corbin v. Sabel, 138 Ariz. 253, 674 P.2d 316 (App. 1983). Official census data is reliable and is admissible by judicial notice.

State v. Bussdieker, 127 Ariz. 339, 621 P.2d 26 (1980). It was proper to take judicial notice that Lake Havasu City is in Mohave County.

State v. McGuire, 124 Ariz. 64, 601 P.2d 1348 (App. 1978). It was proper to take judicial notice that a .22 revolver is designed to expel a projectile by the action of expanding gas.

State v. Floyd, 120 Ariz. 358, 586 P.2d 203 (App. 1978). Trial court could take judicial notice of A.R.S. § 28-104(B).

State v. Jacobs, 119 Ariz. 30, 579 P.2d 68 (App. 1978). Post rules decision, doesn't mention Rule 201, states court can take judicial notice of public officers.

Porris v. State, 30 Ariz. 442, 247 P. 1101 (1926). Taking judicial notice 'burglary was after sunset on certain day, and was therefore first degree burglary did not invade the province of the jury and did not deny the defendant's right of confrontation.

OTHER JURISDICTIONS

United States v. Daychild, 357 F.3d 1082 (9th Cir. 2004). It is not improper for a court to take judicial notice of a grand jury indictment.

United States v. Esquiverl, 88 F.3d 722, 726-27 (9th Cir. 1996). The court could take notice of census data for the state because it was from the same source that defendant derived his evidence and so the source was not in dispute.

United States v. Chapel, 41 F.3d 1338, 1342 (9th Cir. 1994). The court did not usurp the jury's fact-finding role by taking judicial notice of a bank's insured status because the court told the jury

that they were not required to accept the court's view.

United States v. Roynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977). Fact trafficking in drugs often involves person of lowest caliber is judicially noticeable.

United States v. Haldeman, 559 F.2d 31 (D.C.Cir. 1976). Judge, in hearing on evidence admissibility, could take judicial notice that testimony had been presented previously on a somewhat related matter.

United States v. Hughes., 542 F.2d 246 (5th Cir. 1976). The court could take judicial notice that streets on which DWI occurred were within federal enclave proper.

United States v. Bourque, 541 F.2d 290 (1st Cir. 1976). Whether or not Internal Revenue Service ever loses tax forms was not noticeable.

Government of Virgin Islands v. Testamark, 528 F.2d 742 (3rd. Cir. 1976). The court cannot take judicial notice of coroner's certificate to establish cause of death.

United States v. Anderson, 528 F.2d 590 (5th Cir. 1976). The court could notice that Tallahassee, Florida is within United States.

People v. Davis, 357 N.E.2d 792 (Ill. 1976). It was proper for the court to take judicial notice of court's prior conviction of defendant and violation of defendant's probation.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

Federal Rule not adopted.

RULE 302. APPLICABILITY OF STATE LAW IN CIVIL ACTIONS AND PROCEEDINGS

Federal Rule not adopted because of the non-adoption of Rule 301.

Comment

Federal Rules of Evidence, Rule 302, was not adopted because of the non-adoption of Rule 301. No other purpose was intended.

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Source: Federal Rules of Evidence, Rule 401.

ARIZONA CASES

I. EVIDENCE FOUND RELEVANT

State v. Armstrong, 218 Ariz. 451, 459, ¶¶ 25-7, 189 P.3d 378, 386 (2008). Testimony that was about planning and execution of the murders was relevant to the sentencing phase in a capital case.

State v. Connor, 215 Ariz. 553, 563, ¶¶ 33-4, 161 P.3d 596, 606 (2007). Evidence that victim's family had warned victim to stay away form Defendant and not to let him into the apartment was relevant to explain the victim's behavior.

State v. Miller, 215 Ariz. 40, 42, ¶ 8, 156 P.3d 1145, 1147 (App. 2007). Evidence that string of robberies with a certain signature stopped after defendant was arrested for the crimes is relevant.

State v. Tucker, 215 Ariz. 298, 313, ¶¶ 45-51, 160 P.3d 177, 192 (2007). It was not fundamental error to admit photographs of copses, autopsies, and bondage scenes that were found on defendant's bedroom wall because the threshold for relevance is low, and the photos could have shown that the defendant knew the amount of force it would take to kill the victim.

State v. Fulminante, 193 Ariz. 48, 502, ¶¶ 56-7, 975 P.2d 75, 92 (1999). A low statistical probability does not make something irrelevant if "the offered evidence tends to make the existence of any fact in issue more or less probable".

State v. Greene, 192 Ariz. 431, 437-38, ¶¶ 20-23, 967 P.2d 106, 112-13 (1998). Post-arrest letters written by defendant to witnesses were relevant because he did not challenge the witnesses' statements and showed he hade no remorse for the murder he committed.

State v. Rienhardt, 190 Ariz. 579, 587, 951 P.2d 454, 462 (1997). "A prior consistent statement properly admitted under Rule 801(d)(1)(B), Ariz. R. Evid., is, by definition, relevant under Rule 401."

State v. Lacy, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996). Shoe print evidence, found at parts of crime scenes, was relevant to show that defendant may have lied about the extent of his involvement.

State v. Rivera, 152 Ariz. 507, 733 P.2d 1090 (1987). Evidence of victim's heterosexuality was relevant where defense was that victim made a homosexual pass at the defendant.

State v. Via, 146 Ariz. 108, 704 P.2d 238 (1985). Trial court did not err under Rules 401 and 404(b) when it allowed defendant's girlfriend to testify that defendant taught her how to use a rifle and said he was down in Tucson buying marijuana near the time of the crime. Both incidents were relevant since the charged murder was with a gun and buying marijuana was a less serious crime used to hide the murder.

State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied 104 S.Ct. 2670. Testimony from witness that he was required to answer truthfully when called on by a law enforcement agency was relevant to show that witness had no motive to lie.

State v. Allen, 140 Ariz. 412, 682 P.2d 417 (1984). Evidence that defendant tried to procure false testimony is relevant.

State v. Roscoe, 145 Ariz. 212, 700 P.2d 1312 (1984). Autopsy photographs of little girl showing evidence of asphyxiation were relevant.

In the Matter of the Appeal in Maricopa County Juvenile Action No. J54374, 137 Ariz. 19, 667 P.2d 1345 (App. 1983). The fact the mother was indicted for the murder of her second child was relevant in the termination proceedings of her first child.

State v. Montes, 136 Ariz. 491, 667 P.2d 191 (1983). Photographs establishing cause of death were relevant to show that defendant or another caused the victim's death in furtherance of a felony.

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). The trial court has reasonable discretion in deciding what evidence is relevant and its decision will not be disturbed unless it has clearly abused its discretion. Evidence is relevant if it will shed light on the crime committed.

State v. Williams, 136 Ariz. 52, 664 P.2d 202 (1983). A conversation between the defendant and a detective was relevant to show that defendant had actual knowledge of the particulars of the crime.

State v. Spoon, 137 Ariz. 105, 669 P.2d 83 (1983). The trial court has reasonable discretion to determine the relevancy of evidence.

State v. Smith, 136 Ariz. 273, 665 P.2d 995 (1983). The trial judge has broad discretion to determine the relevancy and admissibility of evidence.

State v. Menard, 135 Ariz. 385, 661 P.2d 649 (App. 1982). A hammer, which lab tests determined had caused the pry marks on the hasp hinge from the door of the burned saloon, was clearly relevant. It was admissible for impeachment under *United States v. Havens,* 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), even though it was seized with a defective search warrant.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). "[W]hile the diary entry tending to prove Rita's belief in defendant's confession and consequent conclusion that he was guilty would be irrelevant, highly prejudicial and inadmissible, that entry became important to rebut defendant's evidence that Rita had known the 'confession' was a fabrication. Defendant had put Rita's belief in issue and Rita's diary statement on that point then became 'of consequence to the determination' of that issue. It was therefore relevant."

State v. Greenwalt, 128 Ariz. 388, 626 P.2d 118 (1981). Weapons found in getaway van and near where defendants were arrested were relevant even though they were not shown to have been fired or pointed out of the van. "We reject the idea that only those weapons actually used in the assaults were admissible." See also *State v. Morgan,* 128 Ariz. 362, 625 P.2d 951 (App. 1981).

State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981). Opinion testimony that "something pretty serious" happened to the victim and that she experienced marked personality changes after the incident was admissible. "[A]ny evidence which substantiates the credibility of a prosecuting witness on the question of guilt is relevant and material."

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981). Re-enactment of shooting showing firing positions was admissible. "[T]he demonstration was relevant to the issues of premeditation and self-defense."

State v. Printz, 125 Ariz. 300, 609 P.2d 570 (1980). "[T]he value of a television on the day prior to its transfer cannot be said to be irrelevant . . . to its value on the following day."

State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980). Testimony about appellant's statement made prior to shooting incident was admissible even though it was not directed toward a specific class of

people. "Because appellant's earlier statement concerned circumstances similar to those surrounding the shooting, the statement tended to prove that appellant reflected upon shooting the occupants of Koester's van during the chase and that he placed his shotgun pistol on the seat beside him with this purpose in mind."

State v. Kennedy, 122 Ariz. 22, 592 P.2d 1288 (App. 1979). Testimony that "Beisler would not leave the McClure's apartment without being threatened . . ." was relevant to defendants' intent and its rejection was reversible error.

State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980). Testimony regarding the chain of events from kidnapping to later murders was relevant even though witness did not specifically identify defendant.

State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979). Expert testimony regarding the Mexican Mafia was admissible. "[E]vidence regarding the existence, purpose and behavior of such a group and its members was highly probative on the issue of defendant's possible motive for murder."

State v. Starks, 122 Ariz. 531, 596 P.2d 366 (1979). Statement by defendant to the guard he had robbed that he felt sorry that he did not kill the guard when he had the chance was relevant in armed robbery trial.

State v. Price, 122 Ariz. 166, 598 P.2d 985 (1979). In a trial for sale of heroin, "surely a request for a 'taste' of heroin immediately following delivery of the drug is relevant to the issue of intent and motive. . . ."

State v. Neese, 126 Ariz. 499, 616 P.2d 959 (App. 1980). In a trial charging conspiracy to violate marijuana laws, articles of incorporation listing co-defendants as incorporators were relevant. "Merely because the articles of incorporation standing alone cannot establish a conspiracy does not make the document irrelevant."

II. EVIDENCE FOUND IRRELEVANT

State v. Vandever, 211 Ariz. 206, 209, ¶ 13, 119 P.3d 473, 476 (2005). Defendant's general reputation for being a careful and prudent person was irrelevant to whether he was reckless at the time of the event in question.

State v. Davolt, 207 Ariz. 1921, 211, ¶¶ 81-83, 84 P.3d 456, 476 (2004). The trial court did not err in finding that evidence that the victim was unpopular was irrelevant.

State v. Blakley, 204 Ariz. 429, 442, ¶¶ 64-68, 659 P.3d 77 (2003). Evidence that a third party committed other crimes of the same type was irrelevant because the defendant could not connect the third part to the crime/scene.

State v. Tucker, 205 Ariz. 157, 164, ¶ 32, 68 P.3d 110, 117 (2003). Where the defendant had no evidence tying a third party to the crime scene the defendant's speculation that this third person could be the killer was arguably irrelevant.

State v. Oliver, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). "If evidence has not probative value, it is inadmissible under Rule 401, without even reaching Rule 403."

State v. Wargo, 140 Ariz. 70, 680 P.2d 206 (App. 1984). Evidence that defendant had assaulted one of the witnesses was inadmissible as irrelevant to the crime charged (aggravated assault).

State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984). Witness' plea agreement was irrelevant and properly excluded where witness testified that she would not testify against her husband.

State v. Rodgers, 134 Ariz. 296, 655 P.2d 1348 (App. 1982). Since defendant was clearly indicted under A.R.S. § 13-3209(4), the issue of "who induced, compelled, or encouraged Mrs. Williams to reside in the Rodgers' household was not an issue which the state was require to prove under the indictment. Therefore, evidence pertaining to any such inference was of marginal, if any, relevance." Emphasis in the original. Trial court did not abuse its discretion when it ruled that evidence that the victim-witness was a confidential informant was irrelevant to the issue of defendant's guilt or innocence and therefore inadmissible.

State v. Rodgers, 134 Ariz. 296, 655 P.2d 1348 (App. 1982). Trial court did not abuse its discretion when it sustained state's objection to the question of how many acts of prostitution the victim-witness had committed in 1975. She had already admitted that she was a prostitute and earned her living as such in 1975 and "[m]ore importantly the question had nothing to do with Williams' activities during the two years prior to 1980, the time of the alleged offenses." Emphasis in the original.

State v. Navarro, 132 Ariz. 340, 645 P.2d 1254 (App. 1982). Trial court correctly denied defense cross-examination of the victim of a severe beating about whether she had gone dancing two weeks after the beating. "We do not think that within the statutory definition of 'serious physical injury' the victim's dancing two weeks after such an injury to the face, without any allegation of limited mobility, is relevant. We also do not agree that it was an abuse of discretion for the lower court to have ruled that it was irrelevant that the victim was allegedly beaten in the past by a previous husband, when all of the injuries offered as a basis for a finding of 'serious bodily injury' were recent."

State v. Poland, 132 Ariz. 269, 645 P.2d 784 (1982). Trial court abused its discretion by admitting a taser gun which the state did not connect to the crime into evidence. "We do not believe that the taser gun was relevant to a determination of the facts in this case."

State v. Williams, 132 Ariz. 153, 644 P.2d 889 (1982). Officers' treatment of other prisoners was irrelevant in a trial for dangerous or deadly assault by a prisoner where the defendant was not entitled to a self-defense instruction.

State v. Corrales, 131 Ariz. 471, 641 P.2d 1315 (App. 1982). "[T]he codefendant's guilt does not make the accused's guilt 'more probable or less probable' Rule 401, Rules of Evidence, 17A A.R.S. Such evidence is no more relevant when offered by the accused on the issue of guilt or innocence than when it is offered by the state on the same issue, and is properly excluded."

State v. Razinha, 123 Ariz. 355, 599 P.2d 808 (App. 1979). "The opinion of the prosecuting attorney in the Harris case [an earlier trial of defendant's stepfather on the same charge], the same attorney who prosecuted appellant's case, as to the reliability of appellant's admission is wholly irrelevant, immaterial and incompetent."

State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979). The trial judge did not abuse its discretion by excluding testimony from the victim's mother that about a month before the victim's death, somebody knocked on her door and shots were fired into her house. "This evidence did not bear upon any material fact in issue or cast light on the crime charged."

State v. Parker, 121 Ariz. 172, 589 P.2d 46 (App. 1978). Due process is not violated by precluding repetitive testimony.

OTHER JURISDICTIONS

United States v. Jones, 566 F.3d 353, 363-64 (3rd Cir. 2009). Facts related to events that took place after a shooting were relevant for a racketeering type charge.

United States v. LaDue, 561 F.3d 855, 857-58 (8th Cir.. 2009). Indicating that police were responding to a report of "shots fired" was relevant to explain that police officer's actions were not an overreaction.

United States v. Diekhoff, 535 F.3d 611, 618 (7th Cir. 2008). In a kidnapping case where the defense strategy was to show legal insanity, it was relevant to show that the defendant knew that kidnapping was illegal because he had been convicted of it before.

United States v. Turner, 400 F.3d 491, 498 (7th Cir. 2005). In a money laundering case, it was relevant to show that defendant's accounts had unexplained amounts of money in them.

United States v. Zimeri-Safie, 585 F.2d 1318 (5th Cir. 1978). It was proper to allow book seized from defendant's apartment which told how to falsify records. Even though it was copyrighted one year after illegal alien purchased a firearm, it helped show alien knew he was illegal.

United States v. Johnson, 585 F.2d 119 (5th Cir. 1978). Whether savings and loan officers knew statement was false properly was excluded even if relevant, confession outweighed probative value.

United States v. Kasto, 584 F.2d 268 (8th Cir. 1978). Prior chastity of rape victim is irrelevant.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). Intent is not an element, exclusion of intent evidence is approved.

United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978). Gun and drugs were probative of intent and relevant even though crime charged involved neither.

United States v. Madera, 574 F.2d 1320 (5th Cir. 1978). Admission of telephone directories to prove business didn't exist is found harmless here.

United States v. Curtis, 568 F.2d 643 (9th Cir. 1978). Vague, bravado statement is found relevant to intent.

United States v. Sanders, 563 F.2d 379 (8th Cir. 1977). Previous insurance claims were probative in insurance fraud prosecution.

United States v. Taylor, 562 F.2d 572 (8th Cir. 1977). Testimony from both psychologist who examined victim 21 months earlier and gynecologist who examined her 5 days after rape were admissible.

United States v. Robinson, 560 F.2d 507 (2nd Cir. 1977). Proof defendant had a gun when arrested was admissible in robbery prosecution because it made it more probable he was the robber than the case without the evidence.

United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976). Unsigned tax return showing capital gains used to procure loan was admissible in tax fraud prosecution.

United States v. Nix, 548 F.2d 1159 (5th Cir. 1977). Admission by defendant of knowledge acquired after crime admissible with limiting instruction to show defendant's knowledge at time of crime.

United States v. Davis, 546 F.2d 617 (5th Cir. 1977). It was proper to exclude defendant's prison record showing rehabilitation progress where defense of coercion was raised on escape charge.

United States v. Williams, 545 F.2d 47 (8th Cir. 1976). Exclusion of insurance agent's knowledge of law in defendant's prosecution for defrauding insurance companies was proper.

United States v. Hobson, 519 F.2d 765 (9th Cir. 1975), cert. denied 96 S.Ct. 283 (1975). Admission of photos of guns proper.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of Arizona or by applicable statutes or rules. Evidence which is not relevant is not admissible.

Source: Federal Rules of Evidence, Rule 402, (modified).

ARIZONA CASES

I EVIDENCE FOUND ADMISSIBLE

State v. Anderson, 210 Ariz. 327, 341, ¶ 41, 111 P.3d 369, 382 (2005). Photos that show that a murder was committed in an especially cruel or depraved way are relevant and admissible.

State v. Davolt, 207 Ariz. 191, 211, PP 81-83, 84 P.3d 456, 476 (2004). Evidence that the victim was unpopular, in an attempt to show that a third party may have killed victim, is irrelevant and inadmissible.

State v. Harrison, 195 Ariz. 28, 31-33, ¶¶ 14-22, 985 P.2d 513, 516-18 (App. 1998). Defendant's statement to the police, that he wished to harm them, made shortly before he assaulted them was relevant and admissible because it discredited defendant's claims of self defense and that the police used excessive force.

State v. Greene, 192 Ariz. 431, 438, ¶¶ 21-22, 967 P.2d 106, 113 (1998). Defendant's post arrest letters were relevant and thus admissible because they showed consciousness of guilt and lack of remorse.

State v. Stokley, 182 Ariz. 505, 515, 898 P.2d 454, 464 (1995). Photographs showing stomp marks on the victim's body that matched the prints of defendant's shoes were relevant and admissible.

State v. Runningeagle, 176 Ariz. 59, 69, 859 P.2d 169, 179 (1993). The similarity of the pattern of the defendant's shoes and the shoe prints found at the scene was relevant evidence, and thus admissible.

State v. Webb, 164 Ariz. 348, 352, 793 P.2d 105, 109 (App. 1990). Photographs that showed the defendant enjoying a vacation shortly after he killed the victim were relevant, and thus admissible, because they rebutted defendant's claims that the shooting was accidental and that he was worried about it.

State ex rel Collins v. Siedel, 142 Ariz. 587, 691 P.2d 678 (1984). Proof of defendant's blood alcohol content was relevant and properly admissible over state's objection.

State v. Clabourne, 142 Ariz. 335, 690 P.2d 54 (1984). Photos of victim were properly admitted even though defendant had stipulated to the identification and cause of death.

State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983). If the probative value of photographs outweigh the emotions they arouse in jurors, the photographs will be admitted within the discretion of the trial court.

State v. Routhier, 137 Ariz. 90, 669 P.2d 68, cert denied 104 S.Ct. 985. Photographs may be admitted to show how the crime was committed, to identify the victim, or to help the jury understand testimony. However, the purpose for which the photographs are to be used must be contested.

State v. Montes, 136 Ariz. 491, 667 P.2d 191 (1983). As long as the least gruesome photographs were shown to the jury, the photographs of the victim's wounds were admissible in the prosecution for felony-murder and armed robbery.

State v. Spoon, 137 Ariz. 105, 669 P.2d 83 (1983). The defendant had conversations with two people who had visited him in jail and the trial court properly admitted the testimony from these people that the defendant was responsible for the murder.

State v. Silva, 137 Ariz. 339, 670 P.2d 737 (App. 1983). The tape-recorded conversation between defendant and undercover agents was properly admitted and did not violate the defendant's Sixth Amendment right of confrontation.

State v. Arvizv, 137 Ariz. 402, 670 P.2d 1226 (App. 1983). The trial court committed reversible error by not admitting recorded statement of the defendant which indicated he was very intoxicated three hours after arrest.

State v. Gerlauoh¸ 134 Ariz. 164, 654 P.2d 800, supplemented in other respects 135 Ariz. 89, 659 P.2d 642 (1982). Relevant photographs, though gruesome, will not be excluded merely because they arouse the jurors' emotions.

State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981). Opinion testimony that "something pretty serious" happened to the victim and that she experienced marked personality changes after the incident was admissible. "[A]ny evidence which substantiates the credibility of a prosecuting witness on the question of guilt is relevant and material."

State v. Smith, 125 Ariz. 412, 610 P.2d 46 (1980). Tape recording of phone call to police by occupants of murder victim's apartment was relevant and admissible since it corroborated the testimony of the caller.

State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980). Testimony about defendant's statement made prior to shooting incident was admissible even though it was not directed toward a specific class of people. "Because appellant's earlier statement concerned circumstances similar to those surrounding the shooting, the statement tended to prove that appellant reflected upon shooting the occupants of Koester's van during the chase and that he placed his shotgun pistol on the seat beside him with this purpose in mind."

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). Autopsy photographs of the victim "showed the nature and location of the injuries, which are relevant to the existence of premedtation." Therefore, they were admissible.

State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (1980). Evidence that knife had been taken from defendant was relevant to the rape charge and admissible, even though the knife itself had been lost by the authorities and was unavailable for presentation to the jury.

II. EVIDENCE FOUND INADMISSIBLE

Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984). One party may be able to retaliate by responding to irrelevant comments produced by the other party, however, even if the defense had been guilty of serious misconduct, the prosecutor could not engage in abusive, argumentative and harassing conduct.

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983). Sodium amytal evidence is not admissible in Arizona courts but may be used for mitigation evidence in determining the death penalty.

State v. Montes, 136 Ariz. 491, 667 P.2d 191 (1983); *State v. Hoskins,* 199 Ariz. 127, 144, 14 P.3d 997, 1015 (2000); *State v. Machado,* 224 Ariz. 343, 230 P.3d 1158, 1178 ¶ 61 (App. 2010). Absent stipulation by both parties, polygraph examination results are not admissible in Arizona courts.

State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (Ariz. 1982). Since polygraph test results are not reliable as evidence, it was not error for the sentencing judge to exclude them where the state opposed the motion to admit them. "The rule in Arizona is that absent stipulation by both parties, lie detector tests are inadmissible."

In re MH 2008-002596, 223 Ariz. 32, ¶ 15, 219 P.3d 242, 246 (App. 2009). Personal knowledge is only admissible if it is relevant to the matter at hand: "Evidence which is not relevant is not admissible."

State v. Ramos, 133 Ariz. 4, 648 P.2d 119 (1982). Some relevant evidence may be excluded for policy reasons.

State v. Corrales, 131 Ariz. 471, 641 P.2d 1315 (App. 1982); *State v. Salazar*, 173 Ariz. 399, 410, 844 P.2d 566, 577 (1992). "Facts judicially noticed become evidence in the case, and are therefore subject to the requirement of relevance embodied in Rule 402. It is well established that evidence of a codefendant's guilty plea is not relevant to the issue of the accused's guilt or innocence."

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). Victim's fear of defendant was inadmissible since "a victim's state of mind is only relevant when identity or the defense of accident, suicide or self-defense is raised."

State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980) appeal after remand 128 Ariz. 583, 627 P.2d 1081 (1981). Refusal to allow defense to cross-examine a witness concerning either a polygraph test taken during the investigation of his kidnapping or the reasons he left a job with the police department was correct since neither contained any evidence relevant to defendant's guilt or innocence.

State v. Mata, 125 Ariz. 243, 609 P.2d 58 (1980) cert. denied 101 S.Ct. 322. Testimony of victim's former boyfriend that victim told him she had prostituted herself with a codefendant in exchange for heroin a month before her death was irrelevant and inadmissible.

OTHER JURISDICTIONS

United States v. Lambert, 580 F.2d 740 (5th Cir. 1978). Excluding evidence of defendant's business routine was proper. The jury had ample evidence already.

United States v. Carleo, 576 F.2d 846 (10th Cir. 1978). Admission of prior beating of suspected informer was proper.

United States v. Ruffin, 575 F.2d 346 (2nd Cir., 1978) Hindsight evidence irrelevant.

United States v. Madera, 574 F.2d 1320 (5th Cir. 1978). Telephone directories to prove non-existence of business were properly admitted.

United States v. Graleda, 570 F.2d 872 (9th Cir. 1978). Courts are not free to establish rules of evidence independent of the Federal Rules; thus previous common law rule that propriety of a stop or arrest by a state officer is subject to both state and federal standards could not be followed.

United States v. Dupee, 569 F.2d 1061 (9th Cir. 1978). It was unnecessary to produce every purchaser of discounted postal money orders.

United States v. Curtis, 568 F.2d 643 (9th Cir. 1978). Vague, bravado statement one month before rape-murder occurred was admissible to show intent.

United States v. Kilbourne, 559 F.2d 1263 (4th Cir. 1977). Sex equals jealousy, photos at scene and photos at morgue proved defendant committed first degree murder, admissible.

United States v. Medico, 557 F.2d 309 (2nd Cir. 1977). Shotgun holes in pants and pellets from wall admissible to show defendant was robber.

United States v. Juarez, 549 F.2d 1113 (7th Cir. 1977). Police reports properly admitted on issue of credibility of officers only, with limiting instruction, after defense attorney tried to show testimony differed from reports.

United States v. Wyers, 546 F.2d 599 (5th Cir. 1977). Brief irrelevant questions about defendant's employment/home were harmless error.

United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976). Exclusion of evidence of smudged fingerprints was proper.

United States v. Snow, 517 F.2d 441 (9th Cir. 1975). Possibility that evidence could be explained doesn't prevent it being admitted.

United States v. Leaphart, 513 F.2d 747 (10th Cir. 1975). Proof of possession of means of committing a crime is admissible here.

United States v. Franks, 511 F.2d 25 (6th Cir. 1975), cert. denied 95 S.Ct. 2654 (1975). Refusal to give voice exemplar is admissible to prove consciousness of guilt.

United States v. Strickland, 509 F.2d 273 (5th Cir. 1975). Concealment and falsification help carry burden of proof and may carry the burden of proving the element of intent by themselves.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Source: Federal Rules of Evidence, Rule 403.

NOTE: Check the cases under Rule 402, if no paydirt is found in this section.

ARIZONA CASES

I. GENERAL RULE

State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986); *State v. Ramsey*, 211 Ariz. 529, 541 ¶ 35-36, 124 P.3d 756,768 (App. 2005). While evidence may be harmful to defendant, it won't be excluded unless it is unfairly prejudicial to the defendant.

State v. Beck, 151 Ariz. 130, 726 P.2d 227 (App. 1986). "The court must weigh the danger of unfair prejudice from admission of the prior inconsistent statement against its probative value."

State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984). In order for relevant evidence to be excluded, the probative value must be substantially outweighed by the danger of unfair prejudice.

State v. Wargo, 145 Ariz. 589, 703 P.2d 533 (App. 1985). Two witnesses were properly excluded because they would only testify that the victim's wife was intoxicated some time after the crime.

State v. Roberts, 139 Ariz. 117, 677 P.2d 280 (App. 1983). The trial judge is in the best position to weigh evidence under Rule 403 and his/her decision will stand in the majority of cases.

State v. Spoon, 137 Ariz. 105, 669 P.2d 83 (1983). *State v. Connor*, 215 Ariz. 553, 564, ¶ 39, 161 P.3d 596, 608 (App. 2007). Trial court has reasonable discretion in weighing prejudicial effect versus probative value of evidence.

State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983). Introduction of inflammatory evidence requires consideration of evidentiary factors, as within the discretion of the trial court and will not be disturbed on appeal unless there was clear abuse of such discretion.

State v. Verive, 128 Ariz. 570, 627 P.2d 721 (App. 1981). "To reject relevant evidence on the basis of unfair prejudice and cumulativeness is within the discretion of the trial court."

State v. Armstrong, 218 Ariz. 451, 459, ¶ 25, 189 P.3d 378,386 (2008). It is within the discretion of the judge to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice."

State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981). "Evidence is not inadmissible simply because it paints a black picture of a defendant's character or his bent for evil."

State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980). "The weighing and balancing under Rule 403 is within the discretion of the trial court and will not be disturbed on appeal unless it has been clearly abused."

State v. Starks, 122 Ariz. 531, 596 P.2d 366 (1979). "All relevant evidence is admissible except in those instances where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay."

II. UNFAIR PREJUDICE

A. PHOTOGRAPHS

State v. Dann, 220 Ariz. 351, 362-63, 207 P.3d 604, 615-16 (2009). When assessing the admissibility of photographs, the Supreme Court considers the photographs' relevance, the likelihood that the photographs will incite the jurors' passions, and the photographs' probative value compared to their prejudicial impact. Photographs cannot be introduced for the sole purpose of inflaming the jury.

State v. Kiles, 222 Ariz. 25, 33-34, 213 P.3d 174, 182-83 (2009). Photos of murder victim were relevant and admissible because they corroborated the defendant committed first degree murder and supported the existence of the aggravating factor of cruelty.

State v. Cruz, 218 Ariz. 149,168-69, 181 P.3d 196, 215-16 (2008). The photograph was relevant to assist the jury "because the fact and cause of death are always relevant in a murder prosecution."

State v. Pandeli, 215 Ariz. 514,524-25, 161 P.3d 557, 567-68 (2007). The probative value of six photographs of victim's body at scene of murder and during her autopsy outweighed prejudice to defendant.

State v. Anderson, 210 Ariz. 327, 339-40, ¶ 39, 111 P.3d 369,381-82 (2005). "The most disturbing photograph shows victim's disfigured head with a knife inserted through the ear and emerging through the nose. But given the photograph's strong relevance in rebutting codefendant's claim that he did not participate in the killing of Delahunt, we do not find its probative value outweighed by its potential to cause unfair prejudice. The photograph illustrates an injury that a sole attacker would likely have had great difficulty inflicting on a struggling victim. The evidence was highly probative in refuting codefendant's trial testimony that he did not assist in the killing and in corroborating his statement to police that he helped defendant pound the knife into the victim's ear."

State v. Jones, 203 Ariz. 1, 49 P.3d 273 (2002). Photographs showing close ups of the victim's injuries.

State v. Lee, 189 Ariz. 608, 614, 944 P.2d 1222, 1229 (1997). Four autopsy photographs were admissible in murder trial, as their probative value substantially outweighed prejudicial effect; photographs were relevant to show location, size, and shape of bullet wounds and to illustrate expert testimony, photographs did not include unnecessary parts of victim's body, and wounds and surrounding skin were cleansed of any excess blood and brain tissue.

State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986). Expert testimony concerning incest victim's recantation was harmful to the defendant but not unfairly prejudicial.

State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986). Behavioral characteristics of child molest victims are admissible. "Such evidence may harm defendant's interests, but we cannot say it is unfairly prejudicial; it merely informs jurors that commonly held assumptions are not necessarily accurate."

State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983) cert. denied 104 S.Ct. 3519. Black and white photos of arson/murder victims may be prejudicial but were relevant to clarify testimony of medical examiner.

State v. Clabourne, 142 Ariz. 335, 690 P.2d 54 (1984). Pictures showing bruises on the victim's body and wounds caused by strangulation and stabbing were probative of malice and premeditation.

State v. Perea, 142 Ariz. 352, 690 P.2d 71 (1984). Gruesome photo of bite mark on victim's neck and of single stab wound to victim's face was probative as to the issue of premeditation.

State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1983). Trial court did not abuse its Rule 403 discretion when it admitted 8 non-repetitive autopsy photographs.

State v. Montes, 136 Ariz. 491, 667 P.2d 191 (1983). Murder wound pictures were relevant because they corroborated the medical examiner's testimony.

State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983). Photo of bullet in victim's skull and the bullet in the burned brain were overly prejudicial and irrelevant to the issue being tried.

State v. Grilz, 136 Ariz. 450, 666 P.2d 1059 (1983). Photos of murder scene and victims corrorobated state's theory that defendant's actions were deliberate and premeditated.

State v. Gerlauqh, 134 Ariz. 164, 654 P.2d 800 (1982). "While the photographs are admittedly gruesome, we cannot say, after a careful review of the evidence, that the trial court abused its discretion in admitting the photographs. Before trial, counsel stipulated to the identity of the victim but state's counsel would not stipulate to the cause of death. The photographs could have shown the jury the location of the wounds and illustrated how the crime was committed. Although the medical examiner testified that he did not need the photographs to describe the wounds to the jury, they may have assisted the jury in understanding his testimony, particularly in light of the fact that his descriptions were couched in technical medical terms."

State v. Walton, 133 Ariz. 282, 650 P.2d 1264 (App. 1982). Where the defense was self-defense and "the most heavily contested issue at trial was the distance between the victim and the defendant at the time of the shots" the trial court did not err in admitting photographs which were probative on the issue of distance and whether the victim was shot in the back or in the side.

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). "Here, the pictures were relevant to the issue of premeditation. They illustrated how the victim was shot from behind at close range while seated normally in his truck. The pictures were helpful to the jury in understanding expert testimony about the distance of the barrel of the shotgun from the victim's head, the angle of entry, and the peculiar configuration of the wound. The trial court expressly found that the probative value of these two photographs outweighed any possible prejudice. we note that the trial court excluded numerous other photographs it found to be cumulative or more likely to arouse the passions of the jury. The trial court exercised its discretion in a sound and proper manner."

State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981). Admission of a photograph of the partially decomposed corpse of the victim with a rope tied around the remains of the neck was not an abuse of discretion. The photo was black and white, it was the only one available to show how the cord was placed around the victim's neck, and it was used by the medical examiner to explain how the cord was knotted.

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). It was not an abuse of discretion to admit autopsy photographs which showed nature and location of injuries [relevant to premeditation] and illustrated the testimony of the pathologist, who stated the photos would aid the jury in understanding his testimony and opinions.

B. CLOTHING

State v. Navarre, 132 Ariz. 480, 647 P.2d 178 (1982). Trial court did not abuse its discretion in admitting the victim's bloody T-shirt. "[T]he probative value associated with the display of the T-shirt outweighed the potential to prejudice the jury." In this case, it would aid the jury in understanding expert testimony regarding gunpowder residue and also show the location of the mortal wounds.

State v. Carriger, 123 Ariz. 335, 599 P.2d 788 (1979). The probative value of expert testimony about defendant's bloodstained shoes was not outweighed by its possible prejudicial effects.

C. PRIOR ACTS

1. BY DEFENDANT

State v. Garcia, 224 Ariz. 1, 226 P.3d 370, 380-81 (2010). The prior bad act evidence was admissible where the probative value of the prior act evidence was not substantially outweighed by any unfair prejudice.

State v. Romar, 221 Ariz. 342, 343-44 212 P.3d 34, 35-36 (App. 2009). The judge granted Defendant's motion to preclude proof of the prior convictions for two counts of sexual abuse, finding that the probative value of the convictions for sexual abuse "without anything else" would be substantially outweighed by the risk of unfair prejudice.

State v. Williams, 209 Ariz. 228, 99 P.3d 43 (App. 2004). Probative value of prior acts outweighed danger of unfair prejudice.

State v. Schackart, 153 Ariz. 422, 737 P.2d 398 (App. 1987). The prior bad acts of defendant against the victim were relevant to the victim's state of mind and the relevancy was not outweighed by the prejudicial effect of the testimony.

State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (App. 1982). Trial court did not abuse its discretion in admitting evidence that the defendant had hit the victim in the head with a baseball bat in a prior incident and, on rebuttal, evidence of specific instances of conduct. There was a great deal of evidence both ways as to defendant's peaceful or violent nature, which was at the center of the case, and the evidence was not so prejudicial as to outweigh its probative value.

State v. Romero, 130 Ariz. 142, 634 P.2d 954 (1981). It is within the trial court's discretion to exclude questions about defendant's prior arrest, which were asked to impeach the testimony of defendant's character witnesses. However, "there was no error asking them as the prosecutor had a legal and factual basis for the questions, he had received the court's permission before trial to ask such questions, and the acts were already in evidence."

"In fact, the trial court could have allowed these questions because a person's arrests, even if they do not result in a conviction, would be within the knowledge of people truly familiar with that person's reputation."

State v. Miller, 128 Ariz. 112, 624 P.2d 309 (App. 1981). It was not an abuse of discretion to permit a superior court judge to testify as to his opinion of defendant's truthfulness in view of the length of the trial, number of witnesses, strong evidence of guilt, and nature of the charges [two were for perjury].

State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981). At an aggravation/mitigation hearing, "[t]he testimony of the three law enforcement officers concerning the details of the prior crimes of violence which were committed by Greenawalt was properly received in the court below."

State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (App. 1981). Evidence which showed defendant's affiliation with Hell's Angels was unduly prejudicial and should have been excluded even though it showed his familiarity with motorcycles because he had already admitted as much.

State ex rel LaSota v. Corcoran, 119 Ariz. 573, 583 P.2d 229 (1978). Defendant's statement to police that he knew he would be contacted and what took them so long (in view of his record) was properly excluded since "any relevance the statement might have would be clearly outweighed by the prejudice that might permeate appellant's case if evidence of a prior record was placed before the jury."

2. BY WITNESS

State v. Lacy, 187 Ariz. 340, 348, 929 P.2d 1288, 1296 (1996); *State v. Robles,* 135 Ariz. 92, 659 P.2d 645 (1983);.Evidence of prior bad acts of a witness are admissible to show motive, opportunity, intent, preparation, plan, knowledge or identity but the trial judge may exclude the evidence if it would confuse the jury.

3. BY VICTIM

State v. Gilfillan, 196 Ariz. 396, 404-05, 998 P.2d 1069, 1077-78 (App. 2000). Although a false accusation of sexual misconduct against another person by the alleged rape victim is an exception to the ban of evidence on victim's past sexual behavior, the court has considerable discretion in determining whether the probative value of the evidence is substantially outweighed by its unfairly prejudicial effect.

State v. Cook, 151 Ariz. 205, 726 P.2d 621 (App. 1986). Where a senile sex assault victim made contradictory statements concerning her previous sexual encounters, the court properly excluded the testimony after balancing under Rule 403.

State v. Mata, 125 Ariz. 243, 609 P.2d 58 (1980). The probative value of testimony by the victim's ex-boyfriend that the victim told him that she had prostituted herself with codefendant in exchange for drugs was outweighed by the danger of unfair prejudice.

D. IMPEACHING STATEMENTS THAT RELATE TO DEFENDANT'S GUILT

State v. Allred, 134 Ariz. 274, 655 P.2d 1326 (1982); *State v. Miller,* 187 Ariz. 254,257-59, 928 P.2d 678, 681-83 (App. 1996); *State v. Sucharew*, 205 Ariz. 16, 23-24, 66 P.3d 59, 66-67 (App. 2003). Rules 403 and 102 sometimes necessitate the inadmissibility of impeaching statements which would otherwise be admissible under Rule 801(d)(1)(A). "Our principal concern must focus on the danger of unfair prejudice when the impeaching testimony is used for substantive purposes. The following circumstances are among the factors to be considered:

1) the witness being impeached denies making the impeaching statement, and
2) the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or
3) there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity, . . .
4) the true purpose of the offer is substantive use of the statement rather than impeachment of the witness,
5) the impeachment testimony is the only evidence of guilt."

State v. Allred, 134 Ariz. 274, 655 P.2d 1326 (1982). "[I]t is an abuse of discretion for the trial court

to permit the so-called impeachment of a witness by use of a statement which incorporates defendant's hearsay admission of a key element of the offense charged, when the impeachment purpose was clearly collateral to the substantive use of the statement and when the making of that statement was uncertain and could only be determined by a resolution of an issue of credibility between two very interested witnesses." In this child molestation trial, the impeaching statements were admissible as to defendant John Allred, but not as to his codefendant.

State v. Cruz, 128 Ariz. 538, 627 P.2d 689 (1981). Trial court erred in admitting a statement that not only impeached the witness' statement, but also related directly to the guilt of the defendant. "Even though an out-of-court statement may be used to cast doubt on a witness' credibility, when it contains the dual purpose of tending to prove a defendant's guilt, it should not be admitted." But see, State v. Allred, supra.

E. WEAPONS

State v. Harding, 137 Ariz. 278, 670 P.2d 383 (1983) cert. denied 104 S.Ct. 1017. Gun properly admitted to show *modus operandi* of defendant who was disguised as a security guard.

State v. Greenawalt, 128 Ariz. 388, 626 P.2d 118 (1981). Admission of weapons which had already been described by witnesses who testified how and where the weapons were discovered and exhibited to the jury during this testimony without objection created no new special prejudice. "The analogy to unreasonably gruesome pictures is not convincing."

F. DOCUMENTS

Shotwell v. Donahoe, 207 Ariz. 287, 294-96, 85 P.3d 1045, 1052-54 (2004). A document is not necessarily inadmissible simply because it contains conclusions or is conclusory. The trial court abused its discretion under Rule 403, ruling the determination by the EEOC was inadmissible, merely as containing conclusions. The record contained no statement of trial court's broad balancing of probative value of determination against its prejudicial effect.

State v. Kelly, 130 Ariz. 375, 636 P.2d 153 (App. 1981). The probative value of blank vehicle registration forms, other blank documents and 14 license plates was not outweighed by prejudicial effect in a case involving a stolen car.

G. DEFENDANT'S STATEMENTS

1. TO VICTIM

State v. Harrison, 195 Ariz. 28, 31-33 985 P.2d 513, 516-18 (App. 1998.) Testimony that Defendant told police officers that if he had a gun they would "both be bleeding" was not unfairly prejudicial.

State v. Starks, 122 Ariz. 531, 596 P.2d 366 (1979). The probative value of defendant's statement to the guard he had robbed (indicating he was sorry he had not killed the guard when he had the chance] was not outweighed by any unfair prejudice.

2. TO OTHERS

State v. Martinez, 196 Ariz. 451, 459-60 999 P.2d 795, 803-04 (2000). Defendant's statements to a friend

that there was an outstanding warrant for his arrest and that he did not want to go back to prison went to his motive in shooting a police officer and were not unfairly prejudicial.

State v. Verive, 128 Ariz. 570, 527 P.2d 721 (App. 1981). The trial court did not abuse its discretion in allowing John Harvey Adamson to testify regarding an admission made to him by defendant. The testimony was not cumulative [Adamson was the only person present during the conversation, so nobody else could present the evidence], Adamson was the only witness not entangled in the criminal activities, defendant made no showing that Adamson's presence materially increased media coverage, the trial court was thorough in instructing the jury so that no juror would judge defendant based on his association with Adamson, and the only defense was to impeach Adamson and other state witnesses by exposing their criminal pasts.

III. CONFUSION

Brethauer v. General Motors Corp., 221 Ariz. 192, 196-97, ¶ 15-17, 211 P.3d 1176, 1180-81 (App. 2009). Recall evidence was irrelevant and would have misled or confused the jury.

State v. Rodgers, 134 Ariz. 296, 655 P.2d 1348 (App. 1982). In a pandering trial, it was not error for the trial court to exclude evidence of bi-sexual activities between the victim and another resident of the defendant's house. The defense was allowed to present evidence that the other woman resident, not the defendant, had encouraged the victim to engage in a life of prostitution and there was "a substantial basis upon which the trial court could find that the testimony was unduly inflammatory and likely to mislead the jury."

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). "'The rule is that threats by a third person against a victim may not be shown unless coupled with other evidence having an inherent tendency to connect such other person with the actual commission of the crime.' *State v. Schmid*, 109 Ariz. 349, 356, 509 P.2d 619, 626 (1973) (citations omitted)." In this case, the trial court did not abuse its discretion in refusing to admit evidence which "simply afforded a vague ground of suspicion" against a third party.

IV. WASTE OF TIME

State v. Dann, 205 Ariz. 557, 568-69, 74 P.3d 231, 242-43 (2003). Exclusion of evidence of third-party culpability was not abuse of discretion. The evidence did not tend to point to a third person's culpability, had no tendency to establish cause of deaths, and might well have wasted time and confused issues at trial.

State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (1982). Rule 403 "gives courts the power to protect witnesses against cross-examination that does little to impair credibility, but that may be invasive of their privacy. The court may prevent cross-examination into collateral matters of a personal nature having minor probative value and tending to bring up collateral matters such as extensive medical histories, which would require unnecessary use of court time."

State v. Contreras, 122 Ariz. 478, 595 P.2d 1023 (App. 1979). Trial court did not abuse its discretion in excluding testimony to the effect that prison inmates sometimes do testify against each other on the grounds of undue delay or waste of time.

State v. Parker, 121 Ariz. 172, 589 P.2d 46 (App. 1978). Excluding a second witness' testimony, which would have been the same as the first witness', was not an abuse of discretion.

V. OPENING THE DOOR

State v. Martinez, 127 Ariz. 444, 622 P.2d 3 (1980). "The fact that the trial court previously ruled the evidence was inadmissible as prejudicial, does not mean the prejudice continues to outweigh its probative value throughout the trial. When the defendant, as here, 'opens the door' by denying certain facts which the evidence, previously excluded, would contradict, he may not rely on the previous ruling that such evidence will remain excluded."

VI. MISCELLANEOUS

State v. Coghill, 216 Ariz. 578, 582-86 169 P.3d 942, 946-50 (App. 2007). Evidence showing a defendant possessed adult pornography, created " disgust and antagonism " toward the defendant and resulted in " overwhelming prejudice."

State v. Moyer, 151 Ariz. 253, 727 P.2d 31 (App. 1986). Where a young victim of child abuse is unable to testify, expert testimony regarding battered child syndrome is highly probative and it's relevancy is not outweighed by its prejudicial effect.

State v. Reyes, 146 Ariz. 131, 704 P.2d 261 (App. 1985). Defense transcript of videotape was properly excluded under Rule 403 because the defense refused the court's reasonable request to have the parties who were speaking identified.

State v. Walker, 138 Ariz. 491, 675 P.2d 1310 (1984). Preserved pieces of the arson victim's burned skin should not have been admitted because there was no controversy that the victim had been burned.

State v. Yee, 121 Ariz. 398, 590 P.2d 937 (App. 1978). No reason to exclude excited utterance that was neither confusing, misleading, or unfairly prejudicial.

OTHER JURISDICTIONS

United States v. Bobo, 586 F.2d 355 (5th Cir. 1978). As long as evidence has value other than to show propensity, judge has discretion to admit it.

United States v. Sancrrey, 586 F.2d 1312 (9th Cir. 1978). Defense attorney arguing prejudice showed judge balanced it before admitting evidence of other rape, failure to make written findings harmless.

United States v. Alora, 585 F.2d 16 (1st Cir. 1978). Any prejudice in admitting marked money given codefendant limited by instructions.

United States v. Kasto, 584 F.2d 268 (8th Cir. 1978). It was proper to bar evidence of rape victim's past, and the fact she was wearing IUD.

United States v. Medical Therapy Sciences, Inc., 583 F.2d 36 (2nd Cir. 1978). If objection made, Rule 403 balance must be decided prior to admitting Rule 608 character evidence.

United States v. Frankenthal, 582 F.2d 1102 (7th Cir. 1978). Admission of the judge's testimony about defense witness's bias was proper.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). Admission of evidence showing possession

of unauthorized credit cards permissible in postman's prosecution for stealing from the mail.

United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). Admission of evidence showing defendant refused to consent to search was reversible error.

United States v. Bohr, 581 F.2d 1294 (8th Cir. 1978). Evidence of similar scheme was properly admitted, where identity at issue.

United States v. Radlick, 581 F.2d 225 (9th Cir. 1978). Admission of preindictment period tape of defendant's conversation was proper. The defendant claimed he was an unknowing participant in the transaction.

United States v. Seastrunk, 580 F.2d 800 (5th Cir. 1978). Evidence that defendant used an alias before and after robbery and that he used a credit card in another name was properly admitted.

United States v. Stewart, 579 F.2d 356 (5th Cir. 1978). Admission of evidence of flight and extraordinary spending was permissible.

United States v. Weiner, 578 F.2d 757 (9th Cir. 1978). The trial court has duty to control cross-examination, and keep counsel from confusing the jury through issue proliferation.

United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978). Admission of a comment on defendant asking for a lawyer was permissible to rebut insanity.

United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978). Gun and drugs found in a motel room were admissible in prosecution not involving charge of possession of either.

United States v. Williams, 577 F.2d 188 (2nd Cir. 1978). The link to conspiracy may have been innocent; therefore prior conviction was admissible to show intention to carry out robbery.

United States v. Caleo, 576 F.2d 846 (10th Cir. 1978). Prior assault on suspected informant was probative and admissible.

United States v. Jackson, 576 F.2d 46 (5th Cir. 1978). Evidence that doctor wrote 5,000 prescriptions for controlled substance over 15 month period was admissible.

United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978). Surveillance corroborating the testimony of the witnesses was admissible.

United States v. Madera, 574 F.2d 1320 (5th Cir. 1978). Telephone directories to prove business was non-existent were admissible.

United States v. Free, 574 F.2d 1221 (5th Cir. 1978). Homosexual acts showed motive and intent in murder.

United States v. Long, 574 F.2d 761 (3rd Cir. 1978). When there is no objection, Rule 103 waives necessity of Rule 403, since it wasn't requested.

United States v. Greenfield, 574 F.2d 305 (5th Cir. 1978). Preindictment period contacts between agent and defendant were permitted with limiting instruction.

United States v. Krohn, 573 F.2d 1382 (10th Cir. 1977), cert. denied 98 S.Ct. 2857. Secretary's statement on how boss referred to one victim was admissible.

United States v. Hockridge, 573 F.2d 752 (2nd Cir. 1978). Extraneous crime showed how conspiracy worked and was admissible.

United States v. Batts, 573 F.2d 599 (9th Cir. 1978). Prior drug sale which did not result in conviction was properly admitted.

United States v. Miller, 573 F.2d 388 (7th Cir. 1978). Inconsistent loan applications were properly admitted without evidence of falsity.

United States v. Sigal, 572 F.2d 1320 (9th Cir. 1978). Innocent proximity defense to a conspiracy charge rebutted with evidence of a prior marijuana possession conviction.

United States v. King, 572 F.2d 1275 (8th Cir. 1978). Evidence of stealing and stripping other vehicles was used to prove knowledge the subject vehicle was stolen and proper with limiting instruction.

United States v. McGee, 572 F.2d 1079 (5th Cir. 1978). Bar on tax forms not in use at time of crime was proper.

United States v. Knowles, 572 F.2d 267 (10th Cir. 1978). As lactose is used to cut heroin, evidence of the possession of container with traces of both was permitted.

United States v. Benedetto, 571 F.2d 1246 (2nd Cir. 1978). Two witnesses said defendant who bribed them contradicted the story that defendant never bribed anyone.

United States v. McClintic, 570 F.2d 605 (8th Cir. 1978). Evidence of a prior attempt to swindle the same victim admissible.

United States v. Lowe, 569 F.2d 1113 (10th Cir. 1978), cert. denied 98 S.Ct. 1507. Having the mother identify the kidnapped baby was proper despite offer to stipulate.

United States v. Rizer, 569 F.2d 504 (9th Cir. 1978), cert. denied 98 S.Ct. 1626. Witness' hospitalization for drug treatment did not go to motive and was properly barred.

United States v. Curtis, 568 F.2d 643 (9th Cir. 1978). Previous statement about ladies was admissible in rape-murder.

Smith v. Wainwright, 568 F.2d 362 (5th Cir. 1978). Prior crime evidence need only be clear and convincing, proof beyond reasonable doubt is unnecessary.

United States v. Lyon, 567 F.2d 777 (8th Cir. 1977). Absence of independent recollection not grounds for exclusion.

United States v. Cady, 567 F.2d 771 (8th Cir. 1977). Evidence received on counts later dismissed was probative on remaining count and admissible.

United States v. Rothman, 567 F.2d 744 (7th Cir. 1977). Codefendant's expert on fraud did not unfairly prejudice the defendant.

United States v. Holladay, 556 F.2d 1018 (5th Cir. 1978). A statement on redirect that the witness lied because he was afraid was properly admitted.

United States v. Hall, 565 F.2d 1052 (10th Cir. 1977). Defendant's attempts to get witness to change her story, and expert testimony defendant attempted to distort her handwriting were admissible. The defense was that the witness consented to the defendant signing her check.

United States v. Weaver, 565 F.2d 129 (8th Cir. 1977). Evidence of a robbery two weeks after the crime was admissible.

United States v. Clayey, 565 F.2d 111 (7th Cir. 1977). Exclusion of state witness' financial condition was proper.

United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977) . Appellate courts should be wary of excluding identifications.

United States v. Alpern, 564 F.2d 755 (7th Cir. 1977). Codefendant's statement implicating defendant limited by instruction was admissible in a conspiracy case.

United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977). Other, later unrelated crimes rebutted duress defense.

United States v. Sanders, 563 F.2d 379 (8th Cir. 1977). Evidence of other uncharged insurance claims was properly admitted.

United States v. Dudley, 562 F.2d 965 (5th Cir. 1977). Where the defense car was borrowed, a prior car theft conviction was admissible.

Durns v. United States, 562 F.2d 542 (8th Cir. 1977), cert. denied 98 S.Ct. 490. Admission of a similar kidnap attempt 10 days earlier was proper.

United States v. Berenquer, 562 F.2d 206 (2nd Cir. 1977). Evidence that an associate gave cocaine to an agent was admissible.

United States v. Von Der Linden, 561 F.2d 1340 (9th Cir. 1977). Truth of defendant's defamatory remarks was irrelevant to extortion charge.

United States v. Dorn, 561 F.2d 1252 (7th Cir. 1977). Complete story revealed other crimes.

United States v. Carillo, 561 F.2d 1125 (5th Cir. 1977). Government couldn't present its case without exposing state crime.

United States v. Nace, 561 F.2d 563 (9th Cir. 1977). Statement by a witness to the effect codefendant put a contract on the witness was covered by limiting instruction.

United States v. Dudek, 560 F.2d 1288 (6th Cir. 1977). Other, state crimes prove intent.

United States v. Gano, 560 F.2d 990 (10th Cir. 1977). Evidence that defendant had sex with victim's mother, furnished drugs, and sex with victim (uncharged) helped established motive, preparation, etc.

United States v. Lewis, 560 F.2d 901 (8th Cir. 1977). Testimony of a probation officer who only stated he was a federal official, was properly admitted to identify the defendant.

United States v. Robinson, 560 F.2d 507 (2nd Cir. 1977). Evidence that defendant had a gun like the robbery weapon when arrested was permitted.

United States v. King, 560 F.2d 122 (2nd Cir. 1977). As the mass of defense documents had little value, and the defense passed a chance to ask witnesses about inconsistencies, exclusion was proper.

United States v. Kilbourne, 559 F.2d 1263 (4th Cir. 1977). Sex showed motive, morgue shots showed murder.

United States v. Mattock, 558 F.2d 1328 (8th Cir. 1977). Credit cards in three person's names in mail fraud case were properly admitted.

United States v. Herzberg, 558 F.2d 1219 (5th Cir. 1977). Rebuttal defendant had testimony that a bad reputation for truth was admissible.

United States v. Johnson, 558 F.2d 744 (5th Cir. 1977). Neglected tax deduction was properly excluded.

United States v. Butcher, 557 F.2d 666 (9th Cir. 1977). Probation and police officers' identification of defendant in surveillance photo were not good but were not an abuse of discretion.

United States v. Peden, 556 F.2d 278 (5th Cir. 1977). Credit card receipts offered to prove intent were properly admitted after the judge considered probative value vs. prejudice.

United States v. Halal, 555 F.2d 558 (6th Cir. 1977). It was proper to refuse mistrial where one month into the trial the defendant put up a defense that he went to Peru as a defense lawyer, not as a coconspirator, to get codefendant out of jail.

United States v. Lustig, 555 F.2d 737 (9th Cir. 1977). When defense attorney strays from relevancy (here informant's. possible involvement in other crimes) it is proper to lead him back.

United States v. Hawley, 554 F.2d 50 (2nd Cir. 1977). "Prior conviction", which occurred between similar instant crime and instant conviction, is proper impeachment.

United States v. Maestes, 554 F.2d 834 (8th Cir. 1977). Fingerprints on other forged checks and possession of false identification was admissible to show intent, etc.

United States v. Czarnecki, 552 F.2d 698 (6th Cir. 1977). Evidence defendant hired witness to do things other than extort money was properly admitted.

Dupuie v. Egeler, 552 F.2d 704 (6th Cir. 1977). Admission of somewhat contradictory eyewitness identification was not a federal constitutional problem.

United States v. Kopel, 552 F.2d 1265 (7th Cir. 1977). Inclusion of the fact the defendant consulted his attorney prior to answering questions in a grand jury transcript that was given to jury was proper to show lie was deliberate.

United States v. Smith, 552 F.2d 257 (8th Cir. 1977). Statement that after the sale the pusher had made enough to go legitimate was properly admitted to show intent.

United States v. Zarattini, 552 F.2d 753 (7th Cir. 1977). It was proper to refuse to allow defense attorney to go into details of state witness' conviction and pending charge.

United States v. Nolan, 551 F.2d 266 (10th Cir. 1977). Evidence of an English smuggling conviction was properly admitted proper.

United States v. Riley, 550 F.2d 233 (5th Cir. 1977). Exclusion of evidence of defendant's failure to take salary raises to prove lack of intent to defraud was proper.

United States v. Coades, 549 F.2d 1303 (9th Cir. 1977). Improper use of prior bank robbery conviction in bank robbery prosecution was harmless error.

United States v. Hendrix, 549 F.2d 1225 (9th Cir. 1977). It was proper to refuse to allow defendant to show he had picked up an illegal alien in his taxi the week before but had not been arrested when caught.

United States v. Juarez, 549 F.2d 1113 (7th Cir. 1977). It was proper to admit police reports to establish credibility of officers only, with limiting instruction, after defense attorney tried to show testimony differed from reports.

United States v. Parker, 549 F.2d 1217 (9th Cir. 1977). "Best evidence often highly prejudicial" -- goes on to hold admission of record of heroin addiction was proper to show motive for robbery.

United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976). Unsigned tax return used procure loan showing capital gain was admissible to show "willfulness" state of mind in tax fraud prosecution.

United States v. Roberts, 548 F.2d 665 (6th Cir. 1977). The jury was entitled to know the whole story -- robbers were on work release from prison [so much for their rehabilitation].

United States v. Nix, 548 F.2d 1159 (5th Cir. 1977). After acquired knowledge was admissible to show defendant had knowledge at time of crime.

United States v. DeVincent, 546 F.2d 452 (1st Cir. 1976). Twenty-year-old robbery prior and ten-year-old homicide indictment were admissible to show reason for extortion victim's fear.

United States v. Maestes, 546 F.2d 1177 (5th Cir. 1977). Evidence of defendant's fingerprints on other checks and false identification were properly admitted to show defendant passed subject checks.

United States v. Cowden, 545 F.2d 257 (1st Cir. 1976). Prior contact with victim was admissible to show defendant knew victim's cash flow situation.

United States v. Kelley, 545 F.2d 619 (8th Cir. 1976). It was proper to exclude evidence that shooting victims threatened defendant and others where defendant denied shooting.

United States v. Moss, 544 F.2d 954 (8th Cir. 1976). Defendant's statement bank's set-up was "stupid" was admissible.

United States v. Harris, 542 F.2d 1283 (7th Cir. 1976). Refusal to allow defendant to ask witness if defendant committed nonrelevant killing was proper.

Proof of Records; Records of public officials: See 16 A.R.S. Rules of Civil Procedure, Rule 44(a).

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) *Character evidence generally*. evidence of a person's character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused or civil defendant.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or evidence of the aberrant sexual propensity of the accused or a civil defendant pursuant to Rule 404(c);

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) *Other crimes, wrongs, or acts*. Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) *Character evidence in sexual misconduct cases*. In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

(vi) relevant intervening events;

(vii) other similarities or differences;

(viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

(2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.

(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause show

(4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. Sec. 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. Sec. 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under Sec. 13-1405, sexual assault under Sec. 13-1406, or molestation of a child under Sec. 13-1410.

Comment

State v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976) is consistent with and interpretative of

Rule 404(a)(2).

Source: Federal Rules of Evidence, Rule 404.

NOTE: The Arizona Supreme Court wrote the Arizona Comment to this Rule and Rule 608(b) to emphasize its decision to exclude evidence of the prior unchastity of the prosecutrix in rape cases.

ARIZONA CASES

I. CHARACTER EVIDENCE GENERALLY

State v. Fish, 222 Ariz. 109, 117, ¶ 20, 213 P.3d 258,266 (App. 2009); *Ritchie v. Krasner,* 221 Ariz. 288, 211 P.3d 1272 (App. 2009); *State v. Cano,* 154 Ariz. 447, 743 P.2d 956 (App 1987); Generally character evidence is inadmissible to prove that a person "acted in conformity therewith on a particular occasion."

A. DEFENDANT'S CHARACTER

State v. Rhodes, 219 Ariz. 476, 478-80, 200 P.3d 973, 975-77 (App. 2008). Defendant's sexual normalcy was admissible character evidence in prosecution for sexual conduct with a minor; sexual normalcy was character trait and pertained to charged offense.

State v. Vandever, 211 Ariz. 206, 208-09, 119 P.3d 473, 475-76 (App. 2005.) Character evidence that defendant was a prudent and careful person was irrelevant, and therefore inadmissible, in prosecution for manslaughter and endangerment.

State v. Bocharski, 200 Ariz. 50,58, 22 P.3d 43, 51 (2001). Defendant's alleged statement to a fellow inmate following arrest for murder, that "[i]f it were up to me, you would be dead right now," was improper evidence of propensity to commit charged crime of murder.

State v. Wargo, 140 Ariz. 70, 680 P.2d 206 (App. 1984). Evidence that defendant became very violent, punched holes in walls and broke two doors was admissible in aggravated assault case.

State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (1983). Prosecutor improperly argued that defendant's prior convictions meant that he had a predisposition toward crime.

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). Where defendant wanted to present expert testimony regarding defendant's susceptibility to alcoholic black-outs as a character trait, it was properly precluded. "[T]he trial court properly denied appellant's very general request for psychiatric proof on the issue of alcoholic black-outs as it relates to specific intent under Arizona law."

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). Trial court erred in excluding psychiatrist's testimony which would have established defendant's character trait of acting without reflection. The charge was first degree murder and the jury could have concluded that defendant acted impulsively and did not premeditate the homicide. "An expert witness may not testify specifically as to whether a defendant was or was not acting reflectively at the time of a killing."

State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (App. 1981). Defendant had already admitted his knowledge of motorcycles, so evidence showing his affiliation with the Hell's Angels was not admissible to show knowledge and since defendant did not put his character in issue, questions about

whether he rode with the Hell's Angels were reversible error.

State v. Miller, 128 Ariz. 112, 624 P.2d 309 (App. 1981). "Once having testified as to his character for truthfulness, appellant placed the matter in issue and opened it to rebuttal by the prosecution."

State v. Holsinger, 124 Ariz. 18, 601 P.2d 1054 (1979). Prosecutor asking witness if he had told witness that defendant had a long criminal record was prejudicial and required reversal since it was not offered to impeach defendant's character and was not true in any event.

B. VICTIM'S CHARACTER

State v. Fish, 222 Ariz. 109, 213 P.3d 258 (App. 2009). Evidence of victim's specific prior acts of violence and aggression were inadmissible to show that victim was the initial aggressor.

State v. Cano, 154 Ariz. 447, 743 P.2d 956 (App. 1987). The defendant who wishes to introduce evidence of the victim's violent nature must first demonstrate that he knew of the victim's violence.

State v. Wussler, 139 Ariz. 428, 679 P.2d 74 (1984). Evidence of victim's reputation for violence was inadmissible because the victim was not the initial aggressor.

State v. Zamora, 140 Ariz. 338, 681 P.2d 921 (1984). Evidence that victim had a reputation for carrying a gun was irrelevant even though defendant claimed self-defense.

State v. Smith, 136 Ariz. 273, 665 P.2d 995 (1983). Testimony of victim's conscientious and likeable character was improperly admitted. However, there was other overwhelming evidence against defendant.

State v. Garcia, 141 Ariz. 97, 685 P.2d 734 (1984). Victim's virginity before rape was properly admitted to show that intercourse had taken place on the night of the crime.

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). Trial court erred in permitting the prosecution to present evidence of the victim's peaceful character where the defense had introduced no evidence of the victim's character for the state to rebut. It was harmless error under the circumstances.

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). It was not error for the trial court to allow testimony by a homicide detective on redirect that he found no evidence that anybody had a "serious beef" with the victim after cross-examination brought out that no motive for the defendant had been found and the prime thrust of the defense was that somebody else killed the victim. "Under these circumstances, the state could offer evidence in rebuttal to show that no motive for anyone else to kill the victim was uncovered."

State v. Dalglish, 131 Ariz. 133, 639 P.2d 323 (1982). "While the defendant is entitled to elicit evidence of the victim's prior bad acts in order to show his character, a defendant is still required to abide by the rules of evidence when presenting those bad acts."

II. OTHER CRIMES, WRONGS, OR ACTS

State v. Moreno, 153 Ariz. 67, 734 P.2d 609 (App. 1986). The trial court has considerable discretion to admit evidence of other crimes.

A. RULE 404(b)

State v. Connor, 215 Ariz. 553, 564, 161 P.3d 596, 607 (App. 2007). Evidence that murder defendant was involved in a check-cashing scheme that defrauded victim was admissible to show victim's state of mind. The evidence tended to show that Defendant was not a friend with victim, was not welcome at victim's apartment, and victim had a reason for accusing Defendant of stealing money from him.

State v. Beck, 151 Ariz. 130, 726 P.2d 227 (App. 1987). "Arizona courts have long held that repeated acts of incest with the same party may constitute evidence of a common scheme or plan and therefore evidence as to other acts of incest with that party are admissible under Rule 404(b)."

State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986). Even though defendant's use of marijuana was inadmissible, admission did not require a mistrial because it was not unduly prejudicial.

State v. Via, 146 Ariz. 108, 704 P.2d 238 (1985). Trial court did not err under Rules 401 and 404(b) when it allowed defendant's girlfriend to testify that defendant taught her how to use a rifle and said he was down in Tucson buying marijuana near the time of the crime. Both incidents were relevant since murder was with a gun and buying marijuana was the less serious crime used to hide the murder.

State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980). [R]ule 404(b) has not significantly altered the rule existing prior to its 1977 adoption, see *State v. Moore,* 108 Ariz. 215, 495 P.2d 445 (Ariz. 1972), and we therefore find the previous case law in this area, where not inconsistent, to be controlling."

B. WHEN RULE INAPPLICABLE

1. EVIDENCE DOES NOT IMPLY BAD ACT

State v. Perea, 142 Ariz. 352, 690 P.2d 71 (1984). Evidence that defendant and rape/murder victim had been seen "sniffing a substance" together placed the two together and did not imply a bad act.

State v. Starcevich, 139 Ariz. 378, 678 P.2d 954 (App. 1983). No mistrial required where rape victim testified that defendant attempted to make a drug deal in her presence.

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) cert. denied 104 S.Ct. 199. If evidence is relevant it is admissible even if it refers to defendant's prior bad acts.

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). Testimony that the latent prints were compared to defendant's "known prints", without more, is not indicative of a prior criminal record. The court refused to equate "known prints" with "mug shots" because "'mug shot' is synonymous with post-arrest picture, whereas fingerprints, as the trial judge observed, may be 'known' for a number of reasons not associated with criminality."

State v. Watkins, 133 Ariz. 1, 648 P.2d 116 (1982). A detective's testimony that he had seen defendant intoxicated one other time "did not necessarily infer prior criminal conduct on the part of the defendant."

State v. Clow, 130 Ariz. 125, 634 P.2d 576 (1981). Testimony that defendant's wife stayed in "protective custody" at the police chief's house for a few days did not require reversal. "We do not find, however, that the reference to 'protective custody' necessarily implicated the defendant in additional bad acts . . ." In any event, defendant's objection was sustained and the jury was admonished to

disregard.

State v. Grier, 129 Ariz. 279, 630 P.2d 575 (App. 1981). Error, if any, was harmless when an officer testified that she recognized a composite drawing of the defendant. The testimony did not raise an inference that defendant had been involved in prior criminal activity.

State v. Smith, 123 Ariz. 243, 599 P.2d 199 (1979). Police officer's reference to the fact that defendant's car was in the police impound lot in relation to another offense "was not so prejudicial as to require a mistrial or reversal of this case." "(I]t was unclear from his statement that the car had been impounded because of its involvement in a serious crime, and not simply because of a traffic violation."

2. EVIDENCE DOES NOT IMPLICATE DEFENDANT

State v. Passarelli, 130 Ariz. 360, 636 P.2d 138 (App. 1981). "It is doubtful that 17A A.R.S., Rules of Evidence, Rule 404(b) contemplates prior bad acts of someone other than the defendant, when the defendant is not shown to have been involved in the conduct."

C. NEARNESS IN TIME

State v. Salzman, 139 Ariz. 521, 679 P.2d 544 (App. 1984). Evidence of prior charged molestations was properly admitted.

State v. Romero, 130 Ariz. 142, 634 P.2d 594 (1981). In a child molestation case, a prior incident nine months earlier "was properly admitted as substantive evidence of appellant's identity." Both cases involved a six-year-old boy and girl near a school yard, while the defendant sat in a car with his pants down talking about or using underwear to get the victim's attention. The nine-month interval was not too long and there was "no showing of prejudice due to the elapsed time."

State v. Superior Court (Snyder), 129 Ariz. 360, 631 P.2d 142 (App. 1981). Trial court should have admitted defendant's prior acts of child molestation even though they had occurred 45 months earlier. The acts were similar enough and demonstrated defendant's emotional propensity to commit such acts. The Court of Appeals agreed with the state "that the defendant should not be allowed to rely on the fact that from 1977 when he was incarcerated for a sex offense until 1981, no aberrant sexual acts were shown to have occurred. For a period of more than two years, defendant was isolated from contact with children."

D. SHOWING NECESSARY FOR ADMISSION

1. TEST

State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (App. 1982). "Before evidence of a separate crime or offense may be admitted, 'there must be evidence of that other crime substantial enough to take that case to a jury, . . . although it need not be proof beyond a reasonable doubt.' *State v. Marahrens,* 114 Ariz. 304, 307, 560 P.2d 1211, 1214 (1977)."

State v. Miller, 129 Ariz. 465, 632 P.2d 552 (1981). "Admissibility of a prior bad act does not depend on a defendant's conviction for that act. There simply must be sufficient evidence of the commission of the act by the defendant to go to the jury."

EXAMPLE:

State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (App. 1982). Where there was testimony from a witness that she heard the victim tell a doctor that her husband had hit her over the head with a baseball bat, the hospital records also reflected that the statement was made, two witnesses had seen the head injury, and a witness testified that the defendant had admitted the incident, "sufficient evidence was presented as to this incident to render it admissible."

2. NO SHOWING NECESSARY WHEN DEFENSE BRINGS IT IN

State v. Wilson, 134 Ariz. 551, 658 P.2d 204 (App. 1982). Appellants argued that there was no "substantial evidence" of the bad acts sufficient to submit the case to a jury and were therefore inadmissible. "The short answer to this contention is that the requirement only applies when the prosecutor is affirmatively seeking to establish prior bad acts as part of his case and the trial court allows their Admission. In the instant case, all the objectionable matters occurred on questioning by defendants, or as nonresponsive answers to prosecutorial questions, or were stricken by the trial court with instructions for the jury to disregard them."

E. PRIOR BAD ACTS ADMISSIBLE TO SHOW:

1. MOTIVE

State v. Beasley, 205 Ariz. 334, 70 P.3d 463 (App. 2003). Trial court acted within its discretion in admitting aggravated assault defendant's statement to arresting officers that he had fled from officers because he had been mistakenly released from jail and did not want to return, despite defendant's claim that statement referred to irrelevant and prejudicial prior bad acts; statement was admissible to explain the motive for defendant's actions.

State v. Frustino, 142 Ariz. 288, 689 P.2d 547 (App. 1984). Evidence which did not meet the standards of A.R.S. § 13-2304 (A), (B) and (C) was nonetheless admissible under Rule 404(b) to show defendant's motive when he made the charged extortionate loan.

State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied 104 S.Ct. 2670. Evidence that defendant was planning to take over a drug business with the two other murderers was properly admitted.

State v. May, 137 Ariz. 183, 669 P.2d 616 (App. 1983). Subsequent bad acts may be admitted to show motive.

State v. Jackson, 121 Ariz. 277, 589 P.2d 1309 (1979). Evidence that defendant had previously threatened to harm victim, inflicted harm on him, and broke down his door was admissible to show motive and intent. See also, Section 9, "Combination," *infra*.

2. OPPORTUNITY

State v. Miller, 135 Ariz. 8, 658 P.2d 808 (App. 1982). Tape recorded statements to the police in which the defendant mentioned that he had two DWI charges pending were admissible in his murder trial. "[T]he evidence at trial was that the defendant traveled the route that led him to the site of the crime because he wanted to stay off the main road and avoid another citation for, driving while intoxicated. The evidence was therefore directly relevant to the defendant's opportunity to commit the crime, because his driving off the main road led him to the desert where the victim was found." See also Section 9, "Combination," *infra*.

3. INTENT

State v. Stein, 153 Ariz. 235, 735 P.2d 845 (App. 1987). "Evidence of defendant's possession of heroin could have been relevant to demonstrate his knowledge, intent, and absence of mistake in possessing the methamphetamine."

State v. Huey, 145 Ariz. 59, 699 P.2d 1290 (1985). Defendant's prior bad act of sexual abuse was properly admitted under Rule 404(b) because of the similarities and because it showed intent to kidnap and control women through sexual abuse.

State v. Frustino, 142 Ariz. 288, 689 P.2d 547 (App. 1984). Evidence which did not meet the standards of A.R.S. 5 13-2304(A), (B) and (C) was nonetheless admissible under Rule 404(b) to show defendant's intent when he made the charged extortionate loan.

State v. May, 137 Ariz. 183, 669 P.2d 616 (App. 1983). Defendant's subsequent threats to his wife were relevant to show intent.

State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (App. 1982). "[T]he evidence of the defendant's hostility to his victim demonstrated by the baseball bat incident two months prior to her death is directly relevant to his intent the night she was killed." The evidence was admissible pursuant to rule 404(b).

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981). Testimony that defendant wanted an automatic pistol altered to fire faster "to scare" people and a shotgun sawed off to "kill a pig if they get in my way..." was admissible and relevant to intent and premeditation.

State v. Curiel, 130 Ariz. 176, 634 P.2d 988 (Ariz. 1981). "Here, the charge was possession for sale and therefore a prior sale of narcotics was relevant to the issue of possession with intent to sell."

State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981). "Testimony regarding appellant's escape and flight from the Arizona State Prison, as well as testimony regarding the capture is relevant and admissible to show either that the murders occurred in 'effecting an escape,' 'to avoid or prevent lawful arrest,' or both."

State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). "The admission of evidence that the victim's wallet was missing is justified, because it tended to prove defendant's intent to participate in the burglary [which was the felony alleged in the charged felony murder]."

State v. Price, 123 Ariz. 166, 598 P.2d 985 (1979). "Surely a request for a 'taste' of heroin immediately following delivery of the drug is relevant to the issue of intent and motive in that it permits the logical inference that one who uses heroin is more likely to have intended to participate in the furnishing thereof in hope of receiving a portion for himself." See also Section 9,"Combination," *infra*.

4. COMMON SCHEME OR PLAN

State v. Harding, 137 Ariz. 278, 670 P.2d 383 (1983) cert. denied 104 S.Ct. 1017. Testimony from a victim who had survived a similar attack by the defendant was properly admitted to show a common scheme.

State v. May, 137 Ariz. 183, 669 P.2d 616 (App. 1983). Subsequent bad acts are admissible to show plan or that there was no mistake or accident.

State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (1980). Where the crimes were "committed in the same Laundromat, occurred at night, and the accused commenced the assaults by demanding the panties of his victims," the similarities were sufficient to show a common scheme or plan and make the evidence admissible despite the passing of fifteen months.

State v. Jerousek, 121 Ariz. 420, 590 P.2d 1366 (1979). "[E]vidence of other occasions when the defendant molested the victim could have properly been admitted under the common scheme or plan exception...." See also Section 9, "Combination," *infra*.

5. SEXUAL ABERRATION

a. TEST FOR ADMISSIBILITY

State v. Grainge, 186 Ariz. 55, 918 P.2d 1073 (App. 1996). Evidence of prior bad acts admissible to show propensity for sexual aberration.

State v. Cuen, 153 Ariz. 382, 736 P.2d 1194 (App. 1987). "We do not believe that touching the thigh of a woman while under the influence of alcohol can be classified as aberrational."

State v. Jerousek, 121 Ariz. 420, 590 P.2d 1366 (1979). "For prior bad acts to be admissible under the sexual aberration exception, they must be similar to the crime charged, committed within a period shortly before or after the crime charged, involve sexual aberration, and be offered in a case involving sexual aberration."

b. EXAMPLES

State v. Lopez, 170 Ariz. 112, 822 P.2d 465 (App. 1991). Evidence of Defendant's previous acts of sexual misconduct with other boys were admissible.

State v. Beck, 151 Ariz. 130, 726 P.2d 227 (App. 1986). Evidence of incest with an adult daughter shows a sexual aberration.

State v. Ashelman, 137 Ariz. 460, 671 P.2d 90 (1983). Subsequent sexual attacks on female real estate agents were properly admissible.

State v. Romero, 130 Ariz. 142, 634 P.2d 594 (1981). "'Other acts or crimes may be shown if they are relevant, regardless of their criminal character.'" Quoting *State v. Francis,* 91 Ariz. 219, 371 P.2d 97 (1962). Here, defendant's prior act was admissible in child molestation trial, even though it only resulted in a breach of the peace conviction.

State v. Superior Court (Snyder), 129 Ariz. 360, 631 P.2d 142 (App. 1981). Trial court should have admitted defendant's prior acts of child molestation even though they had occurred 45 months earlier. The acts were similar enough and demonstrated defendant's emotional propensity to commit such acts. The Court of Appeals agreed with the state "that the defendant should not be allowed to rely on the fact that from 1977 when he was incarcerated for a sex offense until 1981, no aberrant sexual acts were shown to have occurred. For a period of more than two years, defendant was isolated from contact with children." See also Section 9, "Combination," *infra*.

6. KNOWLEDGE

State v. Andriano, 215 Ariz. 497, 503, 161 P.3d 540, 546 (2007). Evidence of attempt to procure

life insurance policy is evidence or premeditation in murder case.

State v. Olea, 182 Ariz. 485, 492, 897 P.2d 1371, 1378 (App. 1995). Cocaine found in defendant's car is admissible to negate claim that positive drug test was mistaken.

State v. Woody, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992). Evidence of prior DUI convictions can be used to show knowledge of the consequences of drunk driving.

State v. Stein, 153 Ariz. 235, 735 P.2d 845 (App. 1987). "Evidence of defendant's possession of heroin could have been relevant to demonstrate his knowledge, intent, and absence of mistake in possessing the methamphetamine."

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) cert. denied 104 S.Ct. 199. Evidence of escape, although a prior bad act, is admissible as evidence which may indicate knowledge of guilt.

State v. Conroy, 131 Ariz. 528, 642 P.2d 873 (App. 1982). Evidence that the defendant gave a false name and false social security number to police when he was arrested was admissible. "Concealment of identity is similar to flight in that it permits an inference of guilty knowledge."

State v. Hines, 130 Ariz 68, 633 P.2d 1384 (1981). Where defendant put his intent and knowledge at issue in possession of marijuana case by denying that he put the marijuana in his pants pocket and by calling a witness who testified that she did it, it was not error to admit evidence of a similar prior offense.

State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (App. 1981). Questions regarding defendant's affiliation with the Hell's Angels to show his knowledge and expertise with motorcycles was improper since he admitted his familiarity with motorcycles and the questions were highly prejudicial. See also Section 9, "Combination," *infra*.

7. IDENTITY

a. TEST FOR ADMISSIBILITY

State v. Miller, 129 Ariz. 465, 632 P.2d 552 (1981). "[T]he test for admitting evidence of prior bad acts to prove identity [is]: there must be similarities between the offenses in those important aspects where normally differences would be expected to be found. Both the similarities and the differences between the acts should be considered in determining admissibility."

State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980). "We have said that in order [for prior bad acts] to be admissible to prove identity, the *modus operandi* of and circumstances surrounding the two crimes must be sufficiently similar."

State v. Jackson, 124 Ariz. 202, 603 P.2d 94 (1979). The test for admission of other bad acts evidence under the identity exception is the same as for the common scheme exception, i.e., "'[s]imilarities between the offenses *** must be in those important aspects where normally there could be expected to be found differences.' *State v. Akins,* 94 Ariz. at 266, 383 P.2d at 182-83."

b. EXAMPLES

State v. Prion, 203 Ariz. 157, 163, 52 P.3d 189, 195 (2002). A murder and a kidnapping were not similar enough to invoke identity exception to Rule 404 where the murdered woman's body was never

found and the kidnapping victim was a prostitute who was sexually assaulted and released.

State v. Williams, 182 Ariz. 548, 552-53, 898 P.2d 497, 501-02 (App. 1995), superceded by rule on other grounds as stated in *State v. Terrazas*, 187 Ariz. 387, 930 P.2d 464 (App. 1996). Evidence that two robberies, separated by 9 hours and 250 miles, were committed by a man in bib overalls who bound the victim's hands with green duct tape is specific and similar enough to be admitted to show that the same person committed both robberies.

State v. Fierro, 166 Ariz. 539, 547-48, 804 P.2d 72, 80-81 (1990). Evidence that defendant burgled a house in the same neighborhood is admissible to show identity in the burglary of the second house.

State v. Cannon, 148 Ariz. 72, 75, 713 P.2d 273, 276 (1985). Evidence of other armed robberies is admissible to show identity.

State v. Harding, 137 Ariz. 278, 289-90, 670 P.2d 383, 394-95 (1983). Evidence that a murder and robbery both involved salesmen staying at motels as victims, both victims were hogtied and gagged with their own clothing, both victims were dragged to the bathroom and their heads resting on a pillow, both victims had briefcases and clothing stolen from them, and both victims' vehicles were used as get away vehicles was admissible to show identity of the criminal in both cases was the same person.

State v. Padilla, 122 Ariz. 378, 595 P.2d 170 (Ariz. 1979). When mistaken identity has been disclosed as a defense, evidence of prior bad acts was admissible "since it tended to prove the accuracy of the identification of Padilla by the officers." See also Section 9, "Combination," *infra*.

8. COMPLETE STORY

State v. Nordstrom, 200 Ariz. 229, 249, 25 P.3d 717, 737 (2001). Evidence that, hours before a murder, defendant had pistol whipped someone was admissible to complete the story.

State v. Jones, 188 Ariz. 534, 539, 937 P.2d 1182, 1187 (App. 1996). Evidence that defendant sexually assaulted his daughter for several years, in addition to the 10 charged counts, was admissible to complete the story.

State v. Henry, 176 Ariz. 569, 579, 863 P.2d 861, 871 (1993). Evidence of arrest warrant for defendant admissible to complete the story of how officers learned defendant's true identity and the existence of the murder.

State v. Bloomer, 156 Ariz. 276, 280, 751 P.2d 592, 596 (App. 1987). Evidence of other inmates actions is admissible to explain the context of defendant's behavior.

State v. Moreno, 153 Ariz. 67, 734 P.2d 609 (App. 1986). The evidence of a subsequent bad act involving marijuana was probative to complete the story and was not so prejudicial so as to require reversal.

State v. Mincey, 141 Ariz. 425, 687 P.2d 1180 (1984). Evidence that defendant was a drug dealer was necessary to complete the story as to why an undercover drug agent was killed.

State v. Chaney, 141 Ariz. 295, 686 P.2d 1265 (1984). Evidence of defendant's burglaries and theft of another truck in another state was necessary to complete the story of the murder of the deputy.

State v. Libberton, 141 Ariz. 132, 685 P.2d 1284 (1984). Evidence that defendant wanted to get out of

the state to avoid going back to the work furlough program was necessary to complete the story of why defendant wanted the car and money.

State v. Conn, 137 Ariz. 152, 669 P.2d 585, (App. 1982). Evidence that police went to defendant's apartment immediately after the rape victim's call and began surveillance obviously allowed the jury to infer prior bad acts. "But showing that the appellant was out at the time was most important to the state's case. This evidence was admissible to complete the story despite the inference created."

State v. Wilson, 134 Ariz. 551, 658 P.2d 204 (App. 1982). Evidence showing prior bad acts relating to how one of the co-defendants got involved in the criminal activity on trial was admissible "under the 'complete story' exception to explain the interrelationship of the many defendants and their business dealings, as well as their state of mind."

State v. Brokaw, 134 Ariz. 532, 658 P.2d 185 (App. 1982). "Although the appellant's abandonment of his dinner 'guests' may have been a bad act in and of itself, it was also the very act that best revealed his intent to deprive the limousine agency of the value of its services." This evidence was also admissible under the "complete story" exception because it would be "difficult to imagine how the state could have presented its case clearly without showing what had occurred at the restaurant."

State v. Rodriquez, 131 Ariz. 400, 641 P.2d 888 (App. 1982). Burglary victim's testimony that she watched defendant attempt another burglary about 1-1/2 hours after her house was burglarized was admissible under the "complete story" principle. "It is well settled in Arizona that evidence of other criminal acts is admissible when so blended or connected with the crime of which the defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime."

State v. Watkins, 126 Ariz. 293, 614 P.2d 835 (1980). Where testimony about the firing of the pistol "was necessary to complete the narrative of the aggravated assault, . . .it was, therefore, admissible;" the pistol itself was also admissible to explain the testimony.

State v. Jones, 124 Ariz. 284, 603 P.2d 555 (App. 1979). Evidence that the defendant, who was charged with receiving stolen property and conspiracy, had traded marijuana for the guns in question "was properly admitted to show the entire circumstances of the crime, to complete the story."

State v. Reinhold, 123 Ariz. 50, 597 P.2d 532 (1979). "[E]vidence of circumstances which complete the story of a crime are admissible, even though it is revealed that other criminal offenses have been committed."

9. COMBINATIONS OF THE ABOVE

State v. Andriano, 215 Ariz. 497, 503, 161 P.3d 540, 546 (2007). Evidence of defendant's affairs are admissible to show motive for killing her husband, as well as to rebut the defense that defendant was a "domestic violence victim who lived in fear of her husband."

State v. Nordstrom, 200 Ariz. 229, 249, 25 P.3d 717, 737 (2001). Evidence that, hours before a murder, defendant had pistol whipped someone was admissible to show identity and to complete the story.

State v. Mott, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Evidence, in a child abuse trial, that defendant left her daughter with relatives for 2 years, struck the child, and hated her and wished that she was dead was admissible to show motive, credibility, and to rebut defendant's testimony about battered women's syndrome.

State v. Hinchey, 165 Ariz. 432, 434, 799 P.2d 352, 354 (1990). Evidence that defendant, charged with murder, had earlier attacked the victim is admissible to show preparation, plan, and intent.

State v. Stein, 153 Ariz. 235, 239, 735 P.2d 845, 849 (App. 1987). Evidence of heroin possession is admissible in methamphetamine possession prosecution to show knowledge, intent, and lack of mistake.

State v. Wilson, 134 Ariz. 551, 658 P.2d 204 (App. 1982). "[T]he primary issue presented to the jury was whether the defendants intentionally defrauded their victims, or whether this was a simple case of a business failure. Thus proof of motive, intent, preparation, plan, or absence of mistake or accident was highly probative."

State v. Agnew, 132 Ariz. 567, 647 P.2d 1165 (App. 1982). Prior false representations made by defendants to others not victimized by the charged crimes were admissible to show motive, intent, plan, knowledge and lack of mistake even though the representations were somewhat different since "they concerned the same investments and their purported safety."

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981). Evidence of defendant's prior drug dealing "was helpful to a determination of motive, intent, knowledge or absence of mistake or accident by establishing the background in which were set the events culminating in the shooting. We also believe the evidence was admissible to complete the story of the crime."

State v. Sanchez, 130 Ariz. 295, 635 P.2d 1217 (App. 1981). Victim's testimony that defendant told him all his other victims lived and he had gotten away with it once before was admissible to show intent, preparation, plan, and to complete the story of the crime. "It was not necessary to show that appellant had actually committed any prior bad act since he boasted that he had."

State v. Smith, 130 Ariz. 74, 634 P.2d 1 (App. 1981). The state had to prove that defendants acted "recklessly," so testimony and pictures of a prior similar act were admissible "to show knowledge, intent and absence of mistake or accident."

State v. Miller, 128 Ariz. 112, 624 P.2d 309 (App. 1981). Evidence of prior transaction was admissible to show common scheme, plan, and intent because it was sufficiently similar to the instant act and the proof of the prior transaction was "adequate to take the case to a jury."

State v. Martinez, 127 Ariz. 444, 622 P.2d 3 (1980). "The evidence of a subsequent bad act was relevant on the issue of identity and common scheme or plan, and was a proper response to defendant's testimony that he knew Mejia [a co-perpetrator] only vaguely and was home sleeping at the time of the robbery."

State v. Mulligan, 126 Ariz. 210, 613 P.2d 1266 (1980). "The similarity in the manner in which the prior fire was set and the one charged herein evidences a common scheme or plan which shows intent or, at the very least, absence of mistake."

State v. Rose, 121 Ariz. 131, 589 P.2d 5 (1978). "The defendant's concealment of his identity was pertinent to his preparation and plan of the burglary for which he is charged. As such, it reflects his intent to commit the illegal act and was properly admitted into evidence."

F. MISCELLANEOUS

1. PRIOR AS ELEMENT OF CHARGED OFFENSE

State v. Geschwind, 136 Ariz. 360, 666 P.2d 71 (1984). In this felony DWI case, "evidence of a previous DWI conviction [was] relevant and material to prove an element of the crime; that is, the existence of the underlying crime or conduct included by the legislature as an element of the crime charged." A bifurcated trial was unnecessary.

2. POLICE INTERNAL AFFAIRS RECORDS

State v. Superior Court (Cook), 132 Ariz. 374, 645 P.2d 1288 (App. 1982). *DeConcini v. Superior Court,* 20 Ariz.App. 33, 509 P.2d 1070 (1973) is explicitly overruled and the court holds "that no complaint of over-aggressiveness in the internal affairs records of an arresting police officer may be subject to an in camera inspection by the court and possible disclosure to the defendant in the criminal prosecution" because the defendant would be unable to use this evidence of other bad acts to show that the officers acted in conformity with an aggressive and violent character.

3. EXTRINSIC EVIDENCE INADMISSIBLE ON COLLATERAL ISSUES

State v. Hughes, 189 Ariz. 62, 68-69, 938 P.2d 457, 463-64 (1997). In murder prosecution, evidence that defendant was involved in firebombing an apartment was not admissible to show identity, intent, or common scheme or plan.

State v. White, 168 Ariz. 500, 507, 815 P.2d 869, 876 (1991). Evidence of defendant's bigamy not admissible in murder case.

State v. Bolorquez, 151 Ariz. 611, 729 P.2d 965 (App. 1986). Heroin obtained during a search incident to arrest should have been excluded at the defendant's armed robbery trial because there was no connection between the heroin and the money stolen.

State v. Williams, 141 Ariz. 127, 685 P.2d 764 (App. 1984). Evidence of prior assaults on the murder victim were properly excluded because it was not established that defendant had observed the assaults.

State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (App. 1981). Rebuttal testimony that defendant had been in a fight two months before the incident at trial was improper impeachment. "[E]xtrinsic evidence may not be presented to impeach him on this collateral issue."

G. ERROR

1. HARMLESS ERROR

State v. Phillips, 202 Ariz. 427, 433, 46 P.3d 1048, 1054 (2002). Admitting evidence of other robberies was harmless error, as the sole defense was misidentification.

State v. Lee, 189 Ariz. 590, 600, 944 P.2d 1204, 1214 (1997). Failure to sever charges, based on common scheme or plan, was harmless error, because evidence of each charge would have been mutually admissible.

State v. Weaver, 158 Ariz. 407, 409, 762 P.2d 1361, 1363 (App. 1988). Evidence that defendant had been under police surveillance and had been recognized by several police officers from previous encounters was improperly admitted, but was harmless error, in the face of overwhelming evidence.

State v. Gamez, 144 Ariz. 178, 696 P.2d 1327 (1985). Improper suggestion of defendant's criminal

record was harmless error in the face of overwhelming evidence of guilt.

State v. Celaya, 135 Ariz. 248, 660 P.2d 849 (1983). Testimony from state's witness about defendant's prior narcotics violation was improperly admitted but error was rendered harmless when defendant freely testified that he'd been involved in the drug trade.

State v. Grilalva, 137 Ariz. 10, 667 P.2d 1336 (App. 1983), superseded on other grounds by statute, as noted in State v. Cons, 208 Ariz. 409, 413, 94 P.3d 609, 613 (App. 2004). Officer's testimony that defendant had been involved in a prior burglary was error but rendered harmless because the defendant admitted to four prior felony convictions.

State v. Verive, 128 Ariz. 570, 627 P.2d 721 (App. 1981). Isolated reference to "mug shot" by victim did not require reversal. "Having reviewed the record in its entirety, we find that one reference to a 'mug shot' in this six day trial was harmless beyond a reasonable doubt."

State v. Watkins, 126 Ariz. 293, 614 P.2d 835 (1980). Evidence that defendant had acted in a similar manner in the past when he was not intoxicated was "simply another way of showing that defendant acted in conformity with an aggressive and violent character." Although it should not have been admitted, it was harmless error here.

State v. Jackson, 124 Ariz. 202, 603 P.2d 94 (1979). Erroneous admission of bad acts evidence does not always require reversal. In this case, "because of the overwhelming evidence of the defendant's guilt presented by positive eye-witnesses, and the comparatively innocent circumstances surrounding the bad act evidence, any error that occurred was harmless."

2. INVITED ERROR

State v. Wilson, 134 Ariz. 551, 658 P.2d 204 (App. 1982). An answer which mentioned a prior bad act "was in direct response to questioning by defense counsel. It thus constitutes invited error."

3. REVERSIBLE ERROR

State v. Holsinger, 124 Ariz. 18, 601 P.2d 1054 (Ariz. 1979). Prosecutor asking witness whether he (the prosecutor] had ever told him [the witness] that the defendant had a long criminal record was irrelevant under Rule 404(b) and was reversible error.

OTHER JURISDICTIONS

United States v. Southers, 583 F.2d 1302 (5th Cir. 1978) 404(a)(1): It was within discretion of trial court to bar defense character evidence on cross of state's introduction of witness.

United States v. Kasto, 584 F.2d 268 (8th Cir. 1978). It was proper to bar sex history that victim was wearing contraceptive device. *Accord United States v. Driver,* 581 F.2d 80 (4th Cir. 1978).

United States v. Sturgis, 578 F.2d 1296 (9th Cir. 1978) 404(a)(2): Accomplice was allowed to tell why he turned state's evidence.

United States v. Dooley, 587 F.2d 201(5th Cir. 1979). Evidence of other stolen used cars sitting on defendant's lot properly admitted.

United States v. Bobo, 586 F.2d 355 (5th Cir. 1978), disapproved of on other grounds by United States v. Singletary, 683 F.2d 122 (5th Cir. 1982). Co-conspirator saying someone within organization informed on defendant showed conspiracy, showed trusted state's witness, and didn't just show propensity.

United States v. Rucker, 586 F.2d 899 (2nd Cir. 1978). Codefendant's prior conviction for robbing same bank was permissible to show *modus operandi*.

United States v. Sangrey, 586 F.2d 1312 (9th Cir. 1978). Evidence of defendant's participation in second gang rape was admissible in trial of first gang rape as it corroborated victim's story.

United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) Evidence of prior similar drug sales was admissible.

United States v. Peltier, 585 F.2d 314 (8th Cir. 1978). Attempted murder arrest warrant was motive for murder of FBI agent.

United States v. Goehring, 585 F.2d 371 (8th Cir. 1978). Threatening phone calls and speeding ticket showed plan and motive for mailing threatening letter.

United States v. Johnson, 585 F.2d 119 (5th Cir. 1978). Barring evidence that showed witness was in conspiracy was proper. The witness admitted it when he turned state's evidence.

United States v. D'Alora, 585 F.2d 16 (1st Cir. 1978). Marked money defendant gave codefendant was properly limited.

United States v. Askew, 584 F.2d 960 (10th Cir. 1978). Prior conviction for same offense showed knowledge, intent, etc.

United States v. Ramos Algarin, 584 F.2d 562 (1st Cir. 1978). Denial to sever counts was proper because a common scheme was demonstrated.

United States v. Bridwell, 583 F.2d 1135 (10th Cir. 1978). Large drug buy after charged conspiracy showed intent, etc.

United States v. Fuel, 583 F.2d 958 (8th Cir. 1978). Other fraudulent insurance claims were admissible.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). The fact that defendant had other people's credit cards when arrested was admissible in trial for stealing coins from mail.

United States v. Parnelli, 581 F.2d 1374 (10th Cir. 1978). Charged check scheme refinement of precursor; precursor scheme was admissible.

United States v. Bohr, 581 F.2d 1294 (8th Cir. 1978). Recent similar scheme was admissible because identity was at issue.

United States v. Radlick, 581 F.2d 225 (9th Cir. 1978). Drug conversation with codefendant rebutted innocent bystander defense.

United States v. Fritz, 580 F.2d 370 (10th Cir. 1978). Defendant's statement, "I don't have nothing to lose, been in jail most of my life" showed motive, intent, plan and absence of mistake.

United States v. Arroyo-Angulo, 580 F.2d 1137 (2nd Cir. 1978). Evidence of a similar scheme nine months after crime charged was admissible.

United States v. Moore, 580 F.2d 360 (9th Cir. 1978). Evidence that witness said defendant was in prior bank robbery was admissible.

United States v. Griffin, 579 F.2d 1104 (8th Cir. 1978). Prior similar loan fraud was admissible.

United States v. Mahler, 579 F.2d 730 (2nd Cir. 1978). Over 10-year-old convictions proved knowledge and intent.

United States v. Jacobson, 578 F.2d 863 (10th Cir. 1978). Business financial trouble and prior drug sale were admissible.

United States v. Espinoza, 578 F.2d 224 (9th Cir. 1978). Evidence that defendant committed same crime 11 days prior to charged one was admissible.

United States v. Walls, 577 F.2d 690 (9th Cir. 1978). Evidence of other loans rebutted defendant's claim of good faith borrowing.

RULE 405. METHODS OF PROVING CHARACTER

(a) *Reputation or opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. on cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or pursuant to rule 404(c), proof may also be made of specific instances of that person's conduct.

Source: Federal Rules of Evidence, Rule 405.

ARIZONA CASES

State v. Fish, 222 Ariz. 109, 118, 213 P.3d 258, 267 (App. 2009). Victim's reputation of violence is admissible, even though defendant did not know of specific violent acts by victim.

State v. Connor, 215 Ariz. 553, 559, 161 P.3d 596, 602 (App. 2007). Defendant asserting a justification defense may offer reputation or opinion evidence that the victim has a violent or aggressive character trait.

State v. Cano, 154 Ariz. 447, 743 P.2d 956 (App. 1987). The defendant who wants to introduce evidence of the victim's violent nature under Rule 405(b) must demonstrate that he knew of the victim's violent nature.

State v. Santanna, 153 Ariz. 147, 735 P.2d 757 (1987). The defendant cannot bring in evidence of victim's violent nature if the defense is "I didn't do it."

State v. Lee, 151 Ariz. 428, 728 P.2d 298 (App. 1986). There is no error to ask the witness if he was aware that the defendant had been fired from his last job for stealing.

State v. Rainy, 137 Ariz. 523, 672 P.2d 188 (1983). "Do you know about defendant's arrest for . . .?" is a permissible question when allowing proof of character either by reputation or opinion.

State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (App. 1982). "[I]f the defendant presents evidence that he is nonviolent and a person of good character, the Rules of Evidence allow the State to show to the contrary both by way of cross-examination as to specific acts and by witness testimony concerning opinion and reputation. The rules do not permit the state to rebut with specific instances of past conduct, but if such testimony is erroneously offered, the defendant must object to preserve the error."

State v. Superior Court (Cook), 132 Ariz. 374, 645 P.2d 1288 (App. 1982). Evidence of other bad acts of the arresting officer which might be contained in the internal affairs records of the police department would not be "admissible under Rule 405(a) as a trait of character which is an essential element of .a defense. *State v. Lehman,* 126 Ariz. 388, 616 P.2d 63 (App. 1980)."

State v. Romero, 130 Ariz. 142, 634 P.2d 954 (1981). It was not error to ask defendant's character witnesses if they were aware of his previous arrest since the prosecutor had a legal and factual basis for the questions and "a person's arrests, even if they do not result in conviction, would be within the knowledge of people truly familiar with that person's reputation."

State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981). "Lay opinion testimony was a proper method to disprove the victim's character traits which the appellant had attempted to prove with reputation evidence."

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). "Character traits may be established by both expert and non-expert testimony."

State v. Miller, 128 Ariz. 112, 624 P.2d 112 (App. 1980). Trial court did not abuse its discretion when it allowed a superior court judge who presided over and acted as trier of fact in a civil trial involving the defendant to testify to his opinion of defendant's truthfulness. The testimony "did not amount to evidence of a specific instance of conduct in violation of Rule 405(b) or Rule 608(b)." Even if it "did involve a specific instance of conduct the testimony would be admissible under Rule 405(b) because appellant, as an element of his defense, had placed in issue his trait of character for truthfulness."

State v. Lehman, 126 Ariz. 388, 616 P.2d 63 (App. 1980). "[A] character witness may be asked on cross-examination about specific instances of conduct, provided they are relevant." In this case, however, defendant's "proneness to violence was not, in a strict sense, in issue", so character evidence should have been limited to reputation and opinion testimony.

OTHER JURISDICTIONS

Michaelson v. United States, 69 S.Ct. 213 (1948). Can inquire if character witness had heard of particular instances of conduct pertinent to the trait in question.

United States v. Evans, 569 F.2d 209 (4th Cir. 1978): Asking defendant's character witnesses if they'd heard of defendant's criminal record proper.

United States v. Donoho, 575 F.2d 718 (9th Cir. 1978), later remanded to trial court, *United States v. Donoho*, 586 F.2d 682 (9th Cir. 1978). Character of defendant not essential element of entrapment,

barring specific instances of good conduct.

United States v. Morgan, 554 F.2d 31 (2nd Cir. 1977). Proper to ask defendant character witness if he would change opinion about defendant if he knew certain facts from case. If character witness testifies honesty, etc., of defendant, can ask about acts up to time of trial.

Government of Virgin Islands v. Peterson, 553 F.2d 324 (3rd Cir. 1977). Proper to refuse to allow defense attorney to ask defendant's religion to prove character trait of peacefulness.

United States v. Edwards, 549 F.2d 362 (5th Cir. 1977). It was proper to ask character witness who testified to defendant's law abiding reputation if he had heard of 1950 conviction, and a 1956 arrest, *inter alia*.

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Source: Federal Rules of Evidence, Rule 406.

ARIZONA CASES

State v. Slover, 220 Ariz. 239, 245, 204 P.3d 1088, 1094 (App. 2009). Establishing habit requires more than a sparse selection of isolated episodes.

State v. Slover, 220 Ariz. 239, 245, 204 P.3d 1088, 1094 (App. 2009). Habit," evidence of which is generally admissible, describes one's regular response to a repeated specific situation, while "character," evidence of which is generally inadmissible, refers to a generalized description of one's disposition.

State v. Spreitz, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). Testimony that victim rarely accepted rides from acquaintances was admissible as habit evidence to show that victim was probably kidnapped.

Gasiorowski v. Hose, 182 Ariz. 376, 380, 897 P.2d 678, 682 (App. 1994). Habit or routine evidence can be shown by actions occurring after the matter in question, as well as before.

State v. Serna, 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990). Defendant was required to have evidence to show that secret agreement for leniency between prosecutor and prison inmates was "semi-automatic and regular" practice for inmates who cooperated with prosecution, and, thus, testimony of investigator that absolute immunity from prosecution resulted for inmates who cooperated was not admissible in prosecution for murder.

State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984), cert. denied 105 S.Ct. 548 (1984). Evidence that victim carried large sums of money on her should not have been admitted without a showing that

defendant knew of the habit, however, the error was harmless.

State v. Munquia, 137 Ariz. 69, 668 P.2d 912 ,(App. 1983). Evidence that victim bummed drinks was not admissible as evidence of a habit.

OTHER JURISDICTIONS

United States v. Zarattini, 552 F.2d 753 (7th Cir. 1977). It was proper to refuse to allow defense attorney to ask details of state witness' conviction and pending charges.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken, which if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Source: Federal Rules of Evidence, Rule 407.

ARIZONA CASES

Jiminez v. Wal-Mart Stores, Inc., 206 Ariz. 424, 429, 79 P.3d 673, 678 (App. 2003). Photographs showing store's garden center entrance, including remedial measures taken by store after shopper fell, were not admissible in personal injury action brought by shopper; photographs showed that store painted curb area of sidewalk red after shopper fell, and evidence of such subsequent remedial measures could be excluded.

Hallmark v. Allied Products Corp., 132 Ariz. 434, 440, 646 P.2d 319, 325 (App. 1982). If trial court concludes that factors of undue prejudice, confusion of issues, misleading jury or waste of time outweigh probative value of evidence of remedial measures, evidence may be excluded.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

(a) *Prohibited uses*. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

1. Furnishing or offering or promising to furnish – or accepting or promising to accept – a valuable consideration in compromise or attempting to compromise the claim; and

2. Conduct or statements made in compromise negotiations regarding the claim.

(b) *Permitted uses*. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Source: Federal Rules of Evidence, Rule 408.

ARIZONA CASES

John C. Lincoln Hosp. and Health Corp. v. Maricopa County, 208 Ariz. 532, 538, 96 P.3d 530, 536 (App. 2004). Evidence of a settlement agreement otherwise precluded by rule may be offered for a purpose other than to prove or disprove liability or the validity of a claim or its amount, such as to prove the elements of estoppel.

Hernandez v. State, 203 Ariz. 196, 199, 52 P.3d 765, 768 (2002). Purpose of evidence rule governing admissibility of compromise or offers to compromise is to foster complete candor between parties, not to protect false representations.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Source: Federal Rules of Evidence, Rule 409.

RULE 410. OFFER TO PLEAD GUILTY; NOLO CONTENDERE; WITHDRAWN PLEA, OF GUILTY

Except as otherwise provided by applicable act of Congress, Arizona statute, or the Arizona rules of criminal procedure, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere* or no contest, or an offer to plead guilty, *nolo contendere* or no contest to the crime charged or any other crime, or of the statements made in connection with any of the foregoing pleas or offers is not admissible against the person who made the plea, or offer in any civil or criminal action or administrative proceeding.

Source: Federal Rules of Evidence, Rule 410

Cross Reference

17 A.R.S. Rules of Criminal Procedure, Rule 17.4.

ARIZONA CASES

State v. Campoy, 220 Ariz. 539, 545, 207 P.3d 792, 798 (App. 2009). Statements made by defendant to law enforcement after defendant had entered into plea agreement were not made "in connection with" plea agreement, and thus, were admissible in subsequent trial for conspiracy to commit possession and/or transportation of marijuana for sale and possession of marijuana for sale after agreement was withdrawn due to defendant's breach of agreement.

State v. Fillmore, 187 Ariz. 174, 178, 927 P.2d 1303, 1307 (App. 1996). Rule which prohibits admission of statements made in connection with plea negotiation does not protect statements that suspect makes in unsolicited offer to assist authorities in order to avoid prosecution or imprisonment.

State v. Stuck, 154 Ariz. 16, 739 P.2d 1333 (App. 1987). The defendant's statement to a police office that "I want to plead guilty" did not fall into the category of "plea offer" under rule 410. The defendant was merely admitting his guilt and trying to obtain concessions.

State v. Sweet, 143 Ariz. 289, 693 P.2d 944 (App. 1984). Defendant's attempt to get the authorities to let him work off the charges was properly admitted because it was not made in context of any pleas agreement.

State v. Linden, 136 Ariz. 129, 664 P.2d 673 (App. 1983). Evidence of plea bargain did not require reversal because defendant tried to prove his confession was involuntary due to the plea bargain.

State v. Vargas, 127 Ariz. 59, 618 P.2d 229 (1980). "[T]he trial court erred in permitting the state to impeach the defendant's testimony by means of the document he signed during plea negotiations."

OTHER JURISDICTIONS

United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978). Parking lot discussion between DEA agents and defendant not plea negotiation, statements admissible; two tier analysis.

United States v. Arroyo-Angulo, 580 F.2d 1137 (2nd Cir. 1978). Admissions made to stave off deportation, when no charges were imminent, should have been admitted.

United States v. Levy, 578 F.2d 896 (2nd Cir. 1978). Defendant's efforts to help himself, without requesting consideration from prosecutor, were admissions, not negotiations.

United States v. Robinson, 560 F.2d 647 (5th Cir. 1977). Where defendant was negotiating for third parties only, statements are admissible.

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence or insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Source: Federal Rules of Evidence, Rule 411.

ARTICLE V. PRIVILEGES

RULE 501. GENERAL RULE

Except as otherwise required by the Constitution of the United States, the Constitution of Arizona, or by applicable statute or rule, privilege shall be governed by the principles of

the common law as they may be interpreted in light of reason and experience, or as they have been held to apply in former decisions.

Source: Federal Rules of Evidence, Rule 501, (modified).

Cross Reference

A.R.S. Const. Art. 2 § 10, A.R.S. §§ 12-2231 through 12-2239. (Also A.R.S. §§ 13-4062**,** 13-4066, and 32-749).

ARIZONA CASES

I. ATTORNEY-CLIENT PRIVILEGE

Mendoza v. McDonald's Corp., 222 Ariz. 139, 151, 213 P.3d 288, 300 (App. 2009). The question of whether attorney-client privilege has been waived is a mixed question of law and fact and is reviewed *de novo* on appeal.

Elia v. Pifer, 194 Ariz. 74, 82, 977 P.2d 796, 804 (App. 1998). Arizona courts take a "fairness" approach to determining whether implied waiver of the attorney-client privilege should be found in a particular situation

Waitkus v. Mauet, 157 Ariz. 339, 340, 757 P.2d 615, 616 (App. 1988). Defendant's attack on trial counsel's competency waived attorney-client privilege as to those specific contentions asserted. But that waiver does not extend to turning attorney's file over to prosecutor.

State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (Ariz. 1982). In some cases where the issue of competency of trial counsel is raised, it is appropriate to remand the case for a hearing on the question. In such a case "[t]rial counsel should be afforded the opportunity to be heard, and appellant, by his attack on counsel's competency, has waived the attorney-client privilege as to the contentions asserted."

II. PSYCHOLOGIST-CLIENT PRIVILEGE

State v. Connor, 215 Ariz. 553, 560, 464 P.3d 596, 603 (App. 2007). Once the psychologist-patient privilege attaches, it prohibits not only testimonial disclosures in court, but also pretrial discovery of information within the scope of the privilege.

Linch v. Thomas-Davis Medical Centers, P.C., 186 Ariz. 545, 547, 925 P.2d 686, 688 (App. 1996). Psychologist-patient privilege will not prevent seizure based on search warrant, regardless of whether materials to be seized are privileged.

Blazek v. Superior Court, 177 Ariz. 535, 542, 869 P.2d 509, 516 (App. 1994). Scope of implied waiver of psychologist-patient privilege is limited only to those communications concerning specific condition which petitioner has placed at issue..

Bain v. Superior Court, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986). Psychologist-client privileged is waived when the client pursues a course of conduct inconsistent with the privilege.

State v. Ortiz, 144 Ariz. 582, 584, 698 P.2d 1301, 1303 (App. 1985). When defendant requests mental health examination pursuant to Ariz. R. Crim. P. the psychologist-patient privilege

does not exist.

State v. Sands, 145 Ariz. 269, 700 P.2d 1369 (App. 1983). No privilege existed between the psychologist that police had called and the defendant who was talking to the psychologist during a hostage situation.

State v. Howland, 134 Ariz. 541, 658 P.2d 194 (App. 1982). There is a psychologist-client privilege under A.R.S. § 32-2085 only if the psychologist is certified which requires, *inter alia*, that he have a doctorate degree.

OTHER JURISDICTIONS

NOTE: The following cases were decided under Federal, not Arizona Statutes, however they might prove helpful.

United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978). Marital privilege could not be invoked by husband where the wife gave incriminating testimony under immunity, the parties were extensively engaged in criminal drug activity and nature of activities were despicable and completely alien to anything conducive to preservation of family relationship built around marriage.

United States v. Gallagher, 576 F.2d 1028 (3rd Cir. 1978). Veracity of unindicated co-conspirator who was granted immunity is for the jury.

United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978). Marital privilege doesn't apply to discussion of crimes both are participating in.

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATION ON WAIVER

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work product protection.

(a) *Disclosure made in an Arizona proceeding; Scope of a waiver.*

When the disclosure is made in an Arizona proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Arizona proceeding only if:

1) the waiver is intentional;

2) the disclosed and undisclosed communications or information concern the same subject matter; and

3) they ought in fairness to be considered to be considered together.

(b) *Inadvertent disclosure.*

When made in an Arizona proceeding, the disclosure does not operate as a waiver in an Arizona proceeding if:

1) the disclosure is inadvertent;

2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

3) the holder promptly took reasonable steps to rectify the error, including (if applicable)

following Arizona rule of civil procedure 26.1(f)(2).

(c) *Disclosure made in a proceeding in federal court or another state*.

When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an arizona proceeding if the disclosure:

1) would not be a waiver under this rule if it had been made in an arizona proceeding; or

2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) *Controlling effect of a court order*.

An Arizona court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other proceeding.

(e) *Controlling effect of a party agreement*.

An agreement on the effect of a disclosure in an Arizona proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) *Definitions*

in this rule

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for tangible material (or its tangible equivilent) prepared in anticipation of litigation or for trial.

Source: Federal Rules of Evidence, Rule 502.

ARTICLE VI. WITNESSES

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except *as* otherwise provided in these rules or by statute.

Source: Federal Rules of Evidence, Rule 601, (modified).

Cross Reference

A.R.S. §§ 12-2201 and 12-2202.

ARIZONA CASES

I. AGE

Escobar v. Superior Court, 155 Ariz. 298, 302, 746 P.2d 39, 43 (App. 1987). A child witness is competent to testify, even if they do not understand the witness oath. To find a lack of competency, a court must find that "no trier of fact could reasonably believe that the prospective witness

could have observed, communicated, remembered or told the truth with respect to the event in question."

State v. Roberts, 139 Ariz. 117, 677 P.2d 280 (App. 1983). Trial court found nine-year-old competent to testify, but her mental deficiency was a factor in determining credibility.

State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (App. 1982). "[I]t is established that the trial court's discretion in determining a child's competency is practically unlimited." Trial court did not exceed its discretion in admitting the testimony of the victim who was six years old at the time of the incident and seven at the time of trial.

II. DRUGS

State v. Moore, 222 Ariz. 1, 11, 213 P.3d 150, 160 (2009). The court did not err in refusing to give a witness a drug test before allowing her to testify.

State v. Cruz, 218 Ariz. 149, 167, 181 P.3d 196,214 (2008). Trial court did not commit fundamental error by allowing visibly intoxicated witness to testify at trial, in first-degree murder prosecution; although witness's testimony was somewhat rambling, it was coherent.

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) cert. denied 104 S.Ct. 199. Fact that witness is under influence of drugs at the time of incident or at time of testifying does not make witness incompetent.

State v. Piatt, 132 Ariz. 145, 644 P.2d 881 (1982). Where the witness was effectively cross-examined on her use of LSD, a defense expert testified to the possible sensory distortions, and the jury was "properly instructed in its privilege to accept or reject any part of the proffered testimony", it was not error to admit the testimony of the state's key witness even though she was under the influence of four hits of LSD at the time she witnessed the murder.

III. HYPNOSIS

A. PER SE INADMISSIBLE

State ex rel Collins v. Superior Court (Silva), 132 Ariz. 180, 193, 644 P.2d 1266, 1279 (1982) (supplemental opinion). "We reaffirm our previous holdings that hypnotically induced recall testimony is inadmissible. This is a rule of *per se* inadmissibility . . ."

B. PRE-HYPNOTIC RECALL ADMISSIBLE

State v. Harrod, 200 Ariz. 309, 314, 26 P.3d 492, 497 (2001), vacated and remanded on other grounds, 536 U.S. 953, 122 S.Ct. 2653 (2002). A witness never successfully hypnotized may testify. That a witness was successfully hypnotized must be shown by the preponderance of the evidence.

Ulibarri v. Gerstenberger, 178 Ariz. 151, 160, 871 P.2d 698, 707 (App. 1993). Fact that witness' memory concerning event to which she proposes to testify was hypnotically enhanced does not absolutely preclude her from testifying; however, witness may only testify as to events that she remembered prior to hypnosis.

State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637 (1983). State's witnesses who have been

hypnotized are competent to testify about matters which they recall prior to hypnosis.

State ex rel Collins v. Superior Court (Silva), 132 Ariz. 180, 193, 644 P.2d 1266, 1279 (1982) (supplemental opinion). "Thus, applying the *Frye* test of general acceptance and weighing the benefit against the risk, we modify our previous decision and hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. The witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis." Emphasis in original.

OTHER JURISDICTIONS

United States v. Jackson, 576 F.2d 46 (5th Cir. 1978). The fact that witness is a narcotic user goes to weight, not admissibility.

United States v. Lyon, 567 F.2d 777 (8th Cir. 1977). Competency of witness is a matter for court.

United States v. Van Meerbeke, 548 F.2d 415 (2nd Cir. 1976). Co-conspirator state's witness ingestion of opium in front of the jury did not require a mistrial.

United States v. Taylor, 536 F.2d 1343 (10th Cir. 1976). Drug addiction went to credibility, not competency.

United States v. Garcia, 528 F.2d 580 (5th Cir. 1976) cert. denied 96 S.Ct. 3177 (1976). Excessive sum paid informant does not make him incompetent.

United States v. Schwartzbaum, 527 F.2d 249 (2nd Cir. 1975) cert. denied 96 S.Ct. 1410 (1976). Calling prosecutor as witness is acceptable only if required by compelling and legitimate need.

Kline v. Ford Motor Co., Inc., 523 F.2d 1067 (9th Cir. 1975). Witness was competent in civil matter despite fact his "memory" rested on hypnotic refreshing.

United States v. Sarvis, 523 F.2d 1177 (D.C. Cir. 1975). It was proper not to instruct jury that witness had been acquitted earlier.

Smith v. Paderick, 519 F.2d 70 (4th Cir. 1975), cert. denied 96 S.Ct. 293 (1975). Accomplice testimony was competent and may be the sole basis for conviction.

United States v. Gerry, 515 F.2d 130 (2nd Cir. 1975), cert. denied 96 S.Ct. 54. Competency of witness to testify is a threshold question for judge.

United States v. Crockett, 506 F.2d 759 (5th Cir. 1975), cert. denied 96 S.Ct. 37 (1975). Calling party's counsel as a witness is allowed only when testimony is both necessary and otherwise unobtainable.

United States v. Buckhanon, 505 F.2d 1079 (8th Cir. 1974). Whether a defense attorney can testify is up to the judge. Here where defendant had been told to choose between defense attorney being a "key" witness or defense attorney and he chose defense attorney, it was proper to refuse to let defense attorney testify.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Source: Federal Rules of Evidence, Rule 602.

Cross Reference

Application to criminal actions and proceedings: See 17 A.R.S. Rules of Criminal Procedure, Rule 19.3.

ARIZONA CASES

Aranda v. Cardenas, 215 Ariz. 210, 219, 159 P.3d 76, 85 (App. 2007). Witness can testify that he lived with the deceased and had taken her to the hospital.

State v. Ayala, 178 Ariz. 385, 387-88, 873 P.3d 1307, 1309-10 (App. 1994). Rape victim can testify that defendants knew she was trying to get away because she was struggling with them and kicking them.

State v. deBoucher, 135 Ariz. 220, 660 P.2d 471 (App. 1982). "A lay person may testify as to matters within his/her personal knowledge, 17 A.R.S. Rules of Evidence, Rule 602. Whether or not Tofranil was prescribed is a fact within the mother's knowledge. See, 32 C.J.S. S 546(23). Likewise the mother was qualified to testify as to Christa's observable behavior traits both before and following the treatment with Tofranil."

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981). "Although grand jury testimony may be used to impeach a witness' trial testimony, [cites omitted], we agree with appellant that the witness must have been competent to give that testimony for it to be admissible at a subsequent trial." In this case the witness could not have observed the defendant so her testimony was not based on personal knowledge.

State v. Printz, 125 Ariz. 300, 609 P.2d 570 (1980). Where the officer "testified not as to the value of the television sets sold to appellant, but limited his appraisals to similar sets which he had priced in the past and to task force purchases in which he had actively participated", his testimony was admissible.

OTHER JURISDICTIONS

United States v. Lyon, 567 F.2d 777 (8th Cir. 1978). Lack of independent recollection didn't violate Rule 602.

United States v. Haun, 409 F.Supp. 1134 (6th Cir. 1975). Defendant's testimony accorded limited credibility because his memory was foggy and subject to change.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify

truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Source: Federal Rules of Evidence, Rule 603.

Cross Reference

Affirmation in lieu of oath: See 16 A.R.S. Rules of Civil Procedure, Rule 43(b).

Manner of administering oath or affirmation: See A.R.S. § 12-2221 A.

Definition - oath including affirmation or declaration: See A.R.S. § 1-215 (27).

Oaths and affirmations: See A.R.S. Const. Art. 2, § 7.

ARIZONA CASES

State v. Navarro, 132 Ariz. 340, 342, 645 P.2d 1254, 1256 (App. 1982). Irregularity in failing to swear a witness is waived where he is permitted to testify without objection.

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification *as* an expert and the administration of an oath or affirmation to make a true translation.

Source: Federal Rules of Evidence, Rule 604.

Cross Reference

Interpreters—Appointment; court attendants: See A.R.S. § 12-241.

Appointment of interpreters for deaf and mute persons: See A.R.S. § 12-242.

ARIZONA CASES

In re MH 2007-001895, 221 Ariz. 346, 212 P.3d 38 (App. 2009). Burden is on party challenging qualifications of interpreter on appeal to show that an interpreter was somehow deficient resulting in an unfair hearing.

State v. Mendoza, 181 Ariz. 472, 475, 891 P.2d 939, 942 (App. 1995). Determination whether interpreter is qualified is left to sound discretion of trial court.

State v. Hansen, 146 Ariz. 226, 705 P.2d 466 (App. 1985). Even if defendant knew some English, record was ambiguous as to whether defendant knew enough to proceed without an interpreter.

State v. Burris, 131 Ariz. 563, 643 P.2d 8 (App. 1982). "The competency of an interpreter should be determined prior to the time when he enters on the charge of his duties.

State v. Burris, 131 Ariz. 563, 643 P.2d 8 (App. 1982). "We conclude that unless the parties stipulate as to the qualifications of an interpreter, a foundation should be laid before the jury as is done with any other expert witness, and the trial court should then rule on whether the person may or may not so act."

State v. Grubbs, 117 Ariz. 116, 570 P.2d 1289 (App. 1978). Not decided under the rule, but helpful, holds that appointing an interpreter for an Apache rape victim who spoke some English was not error.

RULE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Source: Federal Rules of Evidence, Rule 605.

Cross Reference

Judges shall not charge juries with respect to matters of fact nor comment thereon - A.R.S. Const. Art. 6, § 27.

OTHER JURISDICTIONS

United States v. Frankenthal, 582 F.2d 1107 (7th Cir. 1978). District Judge's brief factual testimony of bias of defense witness proper, limiting instruction.

RULE 606. COMPETENCY OF JUROR AS WITNESS

(1) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) Inquiry into validity of verdict in civil action. Upon an inquiry into the validity of a verdict in a civil action, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror, concerning a matter about which the juror would be precluded from testifying, be received for these purposes.

Source: Federal Rules of Evidence, Rule 606.

Cross Reference

Communication to court by jury: See 16 A.R.S. Rules of Civil Procedure, Rule 39 (g).

Admission of juror evidence to impeach the verdict: See 17 A.R.S. Rules of Criminal Procedure, Rule 24.1(d).

NOTE: Rule 606(b) differs from the federal rule, the Arizona 606(b) is limited to civil verdicts, since Arizona Rules of Criminal Procedure Rule 24.1(d) deals with using a jury verdict to impeach criminal trials. The following federal criminal cases are included here, but any argument should center on Rule 24.1(d).

ARIZONA CASES

Dunn v. Maras, 182 Ariz. 412, 419, 897 P.2d 714, 721 (App. 1995). Rules of Evidence prohibit trial court from accepting evidence concerning mental processes of any juror or effect on jury of information received during deliberations; however, evidence, including juror's affidavits, is permitted on question whether extraneous prejudicial information was improperly brought to jury's attention.

State v. Smith, 182 Ariz. 113, 116, 893 P.2d 764, 767 (App. 1995). Procedural rule governing admissibility of juror evidence to impeach verdict does not confer inquisitorial power on judge to gather evidence ex parte in assessing validity of verdict and proscribes evidence concerning subjective motives behind verdict.

Richmyre v. State, 175 Ariz. 489, 492-93, 898 P.2d 322, 325-26 (App. 1993). Exclusion of juror testimony from proceeding to impeach verdict fosters important public policies of discouraging post-verdict harassment of jurors, encouraging open discussion among jurors, reducing incentives for jury tampering, and maintaining jury as viable decision-making body.

OTHER JURISDICTIONS

United States v. Bohr, 581 F.2d 1294 (8th Cir. 1978). Affidavit foreman was a farmer and was not competent to show he was influenced by sympathy for victim.

United States v. Weiner, 578 F.2d 757 (9th Cir. 1978). Juror's affidavits that one juror voted 'guilty with reservation' were not admissible to impeach the verdict.

United States v. Gambina, 564 F.2d 22 (8th Cir. 1977). No influences outside record alleged, barring inquiry into whether jurors were influenced by security measures proper.

United States v. Eagle, 539 F.2d 1166 (8th Cir. 1976). Juror may only testify to extraneous information in jury room or improper influence on jury, and defense attorney had no right to subpoena juror who realized during trial defendant connected with unrelated shooting.

United States v. Chereton, 309 F.2d 197 (6th Cir. 1962). Juror can't testify to mistake in returning verdict.

United States v. Crosby, 294 F.2d 928 (2nd Cir. 1961). Juror can't testify one defendant's guilty plea implicated others.

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

Source: Arizona Rules of Evidence, Rule 607.

Cross Reference

Arizona Rules of Evidence, Rule 404(a)(3).

ARIZONA CASES

I. GENERAL RULE

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97 (App. 2001). Prior inconsistent statements are admissible for purpose of impeaching witness credibility.

State v. Robinson, 165 Ariz. 51, 58-59, 796 P.2d 853, 860-61 (1990). State was entitled to impeach its own witness with prior allegedly inconsistent statements even though witness claimed failure of memory rather than outright denial of having made earlier statements where statements were introduced only after witness was given opportunity to explain or deny prior statements.

State v. Gortarez, 141 Ariz. 254, 686 P.2d 1224 (1984). Defense counsel was not ineffective for failing to object to the State's impeachment of its own witness.

State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983). Defendant has a right to present evidence that affects the credibility of any witness against him.

State v. Munquia, 137 Ariz. 69, 668 P.2d 912 (App. 1983). Impeachment of witness on collateral matters is not allowed.

State v. Conroy, 131 Ariz. 528, 642 P.2d 873 (App. 1982). "Under Rule 607, it is proper to impeach one's own witness with prior statements, and they are substantively admissible as well. *State v. Acree,* 121 Ariz. 94, 588 P.2d 836 (1978)."

State v. Emery, 131 Ariz. 493, 642 P.2d 838 (1982). "[R]ule 607 eliminated the need to prove damage or prejudice before a party could impeach its own witness. Thus, had the state so desired, it could have impeached Gilliam during direct examination of the witness."

State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (1979). "In Arizona, a party, whether it is the state or a defendant,

is allowed to 'draw the sting' of its own witness."

State v. Acree, 121 Ariz. 94, 588 P.2d 836 (1978). Rule 607 eliminates the need to show surprise, damage, or prejudice before impeaching your own witness.

State v. Sustaita, 119 Ariz. 583, 583 P.2d 239 (1978). "[T]he traditional rule was completely abrogated in this jurisdiction by our adoption of Rules of Evidence which permit any party to attack a witness' credibility, including the party calling him."

II. COURT'S WITNESS

State v. Vaughan, 124 Ariz. 163, 602 P.2d 831 (App. 1979). It was not error for the court to call a codefendant who had already pled out as the court's witness since his "credibility was subject to attack by the prosecution in any event."

III. INTERESTED WITNESS

State v. Burris, 131 Ariz. 563, 643 P.2d 8 (App. 1982). "The fact that a witness has instituted a civil action against the defendant based upon the same transaction charged in the information or indictment has a direct bearing on the credibility of the witness to show bias and prejudice, as well as the witness' relationship to the case." However, in this case the court's refusal to allow such evidence was harmless error.

IV. WITNESS' PSYCHIATRIC HISTORY

State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (1982). "The existence of a, derangement of the sort termed insanity is admissible to discredit, provided that it affected the witness at the time of the affair testified to or while on the stand or in the meantime so as to cripple his powers of recollection."

State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (1982). "We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies."

OTHER JURISDICTIONS

United States v. Craig, 573 F.2d 513 (7th Cir. 1978). Proper for government to call defense witness first and to impeach her testimony, thereby discrediting her before defense could call her.

United States v.. Woolridqe, 572 F.2d 1027 (5th Cir. 1978). Party, here the government, may question its own witness about his prior felony conviction.

United States v. Palacios, 556 F.2d 1359 (5th Cir. 1977). Unnecessary to show surprise prior to impeaching own witness.

United States v. Alfonso, 552 F.2d 605 (5th Cir. 1977). Proper to treat former cop hired by defense attorney who "doesn't remember" as hostile witness, and impeach by statements made after conspiracy ended.

United States v. Smith, 550 F.2d 277 (5th Cir. 1977). State's witness testifying that defense witness admitted going over her testimony with defendant proper to show motive or bias of defense witness.

United States v. Alvarez, 548 F.2d 542 (5th Cir. 1977). Proper to impeach own witness, weak circumstantial evidence does job.

United States v. Kelley, 545 F.2d 619 (8th Cir. 1976). Exclusion of evidence that shooting victims had

threatened defendant and others was proper where defendant denied shooting.

United States v. Bebee, 532 F.2d 110 (8th Cir. 1976). Defendant testified he never dealt drugs before, testimony of undercover narc showed that defendant had dealt 2 months prior to arrest proper.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Comment

State v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976) is consistent with and interpretative of Rule 608(b).

Source: Federal Rules of Evidence, Rule 608.

Cross Reference

Application to criminal actions and proceedings: See A.R.S. Rules of Criminal Procedure, Rule 19.3.

Character of the witness: see Arizona Rules of Evidence, Rule 404(a)(3).

ARIZONA CASES

~~I.~~ ~~OPINION~~ AND REPUTATION EVIDENCE

State v. Nordstrom, 200 Ariz. 229, 252, 25 P.3d 717, 740 (2001). Testimony that a witness had a propensity for violence, was hot-tempered, and took advantage of his friends was not admissible to attack his testimony.

Henson v. Triumph Trucking, Inc., 180 Ariz. 305, 307, 884 P.2d 191, 193 (App. 1994). History of drug misuse is inadmissible, as it has no bearing on credibility of the witness.

State v. Fulminante, 161 Ariz. 237, 252-53, 778 P.2d 602, 617-18 (1988). FBI agent's opinion of

an informer's truthfulness is admissible and the prosecution can introduce this first, to "draw the sting".

State v. Fletcher, 137 Ariz. 306, 670 P.2d 411 (App. 1983). Evidence that witness possessed false birth certificate, passport and used heroin was not admissible as reputation evidence.

State v. Miller, 128 Ariz. 112, 624 P.2d 309 (App. 1980). Once the defendant testified as to his character for truthfulness, the state "was then entitled to prove by opinion or reputation a trait of character for untruthfulness."

II. SPECIFIC INSTANCES OF CONDUCT

A. TRUTHFULNESS - UNTRUTHFULNESS REQUIREMENT

State v. Nordstrom, 200 Ariz. 229, 248, 25 P.3d 717, 736 (2001). Evidence that a witness threatened another witness in a separate case is not probative of truthfulness and should be excluded.

State v. Murray, 184 Ariz. 9, 30-31, 906 P.2d 542, 563-64 (1995). Specific instances of conduct may be introduced under these rules: (1) the conduct may not be proved by extrinsic evidence, (2) the conduct must be probative of the character of the witness for truthfulness, and (3) the trial court must exercise discretion to determine whether the probative value of the conduct is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time.

State v. Prince, 160 Ariz. 268, 273, 772 P.2d 1121, 1226 (1989). Whether witness ever pointed a gun at his wife is not probative of truthfulness.

State v. Castro, 163 Ariz. 465, 470-71, 788 P.2d 1216, 1221-22 (App. 1989). Defendant charged with sexual conduct with a minor should have been allowed to prove unelaborated fact that 17-year-old purported victim had initially falsely claimed that she had been virgin until her sexual acts with defendant.

State v. Cook, 151 Ariz. 205, 726 P.2d 621 (App. 1986). The victim's sexual misconduct is not probative of truthfulness. "[T]he trial court has the discretion to exclude past acts of mendacity wholly unrelated to the instant situation."

State v. Reyes, 146 Ariz. 131, 704 P.2d 261 (App. 1985). Specific instances of conduct must be probative of truthfulness, thus, where witnesses who were ordered not to discuss the case among themselves, discussed football scores, there was no probativeness of truthfulness.

State v. Woods, 141 Ariz. 446, 687 P.2d 1201 (1984). A witness may be asked about specific incidents not involving a conviction if the incidents are probative of truthfulness and extrinsic impeachment is not allowed.

State v. Superior Court (Cook), 132 Ariz. 374, 645 P.2d 1288 (App. 1982). "Specific instances of conduct, for the purpose of attacking or supporting a witness' credibility may, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of a witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. Rule 608(b), Arizona Rules of Evidence, 17A A.R.S. Assaultive conduct does not involve dishonest, or false statement and therefore could not be used to impeach the credibility of the officers."

State v. Littles, 123 Ariz. 427, 600 P.2d 40 (App. 1979). The trial court was correct in ruling that testimony from a defense witness that a prosecution witness was involved with drug rip-offs was inadmissible. "First of all, the proposed specific instances of conduct were not probative of truthfulness or untruthfulness. Secondly, such testimony can only be elicited on cross-examination, which was not the case here since Mr. Snowden was going to be called as a witness for the defense in its case-in-chief."

B. USE OF EXTRINSIC EVIDENCE

State v. Uriarte, 194 Ariz. 275, 279-80, 981 P.2d 575, 579-80 (App. 1998). Court allowed extrinsic evidence to show that witness (defendant's husband) threatened other witnesses, as it demonstrated her bias and propensity to act to protect her husband.

State v. Murray, 184 Ariz. 9, 30-31, 906 P.2d 542, 563-64 (1995). Defense could impeach with prior lies "if you can prove them" or if witness admitted but the court would not allow a full hearing on the issues.

State v. Lee, 151 Ariz. 428, 728 P.2d 298 (App. 1986). The prosecutor could ask if the witness knew that the defendant had been fired from his last job for stealing but the prosecutor could not bring in any extrinsic evidence.

State ex rel Dean v. City Court, 140 Ariz. 75, 680 P.2d 211 (App. 1984). Trial court did not abuse its discretion in requiring the production of internal affairs records of an arresting officer to determine whether the officer had a reputation for dishonesty.

State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (App. 1981). "Even though appellant was cross-examined about past misconduct, without objection, and denied the misconduct, extrinsic evidence may not be presented to impeach him on this collateral issue."

C. EVIDENCE NOT AMOUNTING TO SPECIFIC INSTANCE

State v. Miller, 128 Ariz. 112, 624 P.2d 309 (App. 1980). Opinion testimony of a superior court judge who presided over a civil trial to the court "did not amount to evidence of a specific instance of conduct."

OTHER JURISDICTIONS

United States v. Medical Therapy Sciences, Inc., 583 F.2d 36 (2nd Cir. 1978). Use of fraud conviction entitled witness to support good character.

United States v. Partyka, 561 F.2d 763 (9th Cir. 1977). Impeachment of testifying defendant's reputation for truthfulness.

United States v. Kasto, 584 F.2d 268 (8th Cir. 1978). Exclusion of rape victim's sex history, and fact victim was wearing contraceptive device when attacked was within trial court's discretion.

United States v. Rios Ruiz, 579 F.2d 670 (1st Cir. 1978). Evidence two defense witnesses had been suspended for excessive force admissible in prosecution of two cops for assaults and beatings.

United States v. Weiner, 578 F.2d 757 (9th Cir. 1978). Court has duty to keep defense attorney from confusing jury with a proliferation of collateral matters.

United States v. Hastings, 577 F.2d 38 (8th Cir. 1978). State's witness involvement in drug deals with defendant more prejudicial than probative about truthfulness.

United States v. McClintic, 570 F.2d 685 (8th Cir. 1978). Cross exam about prior attempt to swindle same victim.

United States v. Crippen, 570 F.2d 535 (5th Cir. 1978). Turning back odometers properly limited to consideration of defendant's truth and veracity.

United States v. Young, 567 F.2d 799 (8th Cir. 1977). Barred government witness' offer to pay to have her

husband killed.

United States v. Headid, 565 F.2d 1029 (8th Cir. 1977). Barred state witness' prior bad acts not amounting to felony convictions.

United States v. Cylkouski, 556 F.2d 799 (6th Cir. 1977). Trial judge's prohibiting reputation for truthfulness witness from testifying before defendant took the stand upheld.

United States v. Lustig, 555 F.2d 737 (9th Cir. 1977). Defense attorney straying from relevancy (here informant's possible involvement in other crimes) may be led back.

United States v. Wood, 550 F.2d 435 (9th Cir. 1976). Proper to refuse to allow extrinsic evidence that informant was wanted in Mexico for auto theft, since it was impeachment on a collateral matter.

United States v. Edwards, 549 F.2d 362 (5th Cir. 1977). Proper to refuse cross-examination of state's witness about specific prior bad acts.

United States v. Edwards, 549 F.2d 362 (5th Cir. 1977). Defendant can't call witness just to testify two prosecution witness' characters are bad.

United States v. Brown, 547 F.2d 438 (8th Cir. 1977). Production of extrinsic evidence to rebut claim of bias proper.

United States v. Kelley, 545 F.2d 619 (8th Cir. 1976). Exclusion of evidence that shooting victims had threatened defendant and others [other crimes] proper where defendant denied shooting.

Osborne v. United States, 542 F.2d 1015 (8th Cir. 1976). Harmless error to refuse testimony on state witness' reputation for truth bad where witness admitted a lot of bad things about his reputation.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the

rehabilitation of the person convicted and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. evidence of the pendency of an appeal is admissible.

Comment

Subsection (d) is contrary to the provisions of A.R.S. § 8-207, but in criminal cases due process may require that the fact of a juvenile adjudication be admitted to show the existence of possible bias and prejudice. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The fact of a juvenile delinquency adjudication may not be used to impeach the general credibility of a witness. The admission of such evidence may be necessary to meet due process standards. See, *State v. Morales,* 129 Ariz. 283, 630 P.2d 1015 (1981).

Source: Federal Rules of Evidence, Rule 609.

Cross Reference

For an "equivalent procedure" under subsection (c)(1) See A.R.S. 13-907. Arizona Rules of Evidence, Rule 404(a)(3).

ARIZONA CASES

I. GENERAL MATTERS

A. HEARING

State ex rel. Romney v. Martin, 205 Ariz. 279, 281-82, 69 P.3d 1000, 1002-03 (2003). In order for a prior conviction to be admitted into evidence for purposes of impeachment, the prior conviction must have involved a crime for which imprisonment in excess of one year was at least possible under the applicable law; such a sentence simply was not possible for defendants with respect to their prior first or second time offenses involving the personal possession or use of a controlled substance under statute which prohibited imprisonment for such offenses, and thus, convictions were not admissible for impeachment purposes, even though a third such offense was punishable by imprisonment over one year.

State v. Hoskins, 199 Ariz. 127, 137, 14 P.3d 997, 1007 (2000). Statements obtained in violation of *Miranda* may nevertheless be used for impeachment of testimony given by defendant provided the statements were obtained without violation of traditional standards for evaluating voluntariness and trustworthiness.

State v. McKinney, 185 Ariz. 567, 574, 917 P.2d 1214, 1221 (1996), superseded by statute on other grounds, as stated in *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000). Refusing to allow

defendant's counsel to question state's witness at hearing held to determine if witness could be impeached with juvenile record did not violate defendant's right to confrontation given that defendant and his lawyer were present when witness testified at trial, lawyer cross-examined witness, defendant proffered no evidence to show that witness had juvenile record, witness was not an accomplice, and witness could not have been on juvenile probation at time of trial.

State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985). State met its Rule 609(a) burden when it merely produced time, date and nature of defendant's two prior convictions.

State v. Hester, 145 Ariz. 574, 703 P.2d 518 (App. 1985). Defendant must take the stand and testify before a Rule 609(a)(1) error can be raised.

State v. Hunter, 137 Ariz. 234, 669 P.2d 1011 (App. 1983). The trial court should determine whether to admit prior convictions by making an on-the-record finding based on specific facts, however, failing to do so would not require reversal.

State v. Sullivan, 130 Ariz. 213, 635 P.2d 301 (1981). "[W]hen the state intends to offer a prior conviction in evidence for impeachment of a defendant, the trial judge should require the state to show the date, place and nature of the prior conviction and any other relevant circumstance. The defendant should be permitted to rebut the state's showing of relevancy by pointing out the prejudicial effect to the defendant if the evidence is admitted. The trial judge should consider the matters presented and before admitting the evidence, he should make a finding on the record that the probative value of the evidence substantially outweighs the danger of unfair prejudice."

B. BURDEN OF PROOF

State v. Beasley, 205 Ariz. 334, 342-43, 70 P.3d 463, 471-72 (App. 2003). The state meets its initial burden by showing the date, place, and nature of the prior convictions.

State v. Bolton, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995). Trial court should sparingly admit evidence of prior convictions when prior convictions are similar to charged offense, or in appropriate cases, trial court may reduce risk of prejudice by admitting fact of prior conviction without disclosing nature of crime.

State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985). The conviction must be proved by admission from defendant or by a public record.

State v. Dickson, 143 Ariz. 200, 693 P.2d 337 (1985). Where the defense depended solely on the defendant's credibility, the trial court properly admitted defendant's convictions for passing bad checks and second degree murder.

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983). Where there were no witnesses to the crime, the defendant's credibility was very important, therefore, defendant's prior felony conviction for theft was properly admitted to impeach defendant in his prosecution for murder, kidnapping, sexual assault and other crimes.

State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985). Impeachment evidence was vitally important to the State where the defendant used an alibi defense, therefore, defendant's prior bank robbery conviction was properly admitted.

State v. Aguirre, 130 Ariz. 54, 633 P.2d 1047 (App. 1981). The state met its burden of proof where the defendant's "credibility was important since his testimony was in direct conflict with the victim's and the arresting officers' testimony" and the state "identified the felony convictions by their cause number, the type of offense, and the conviction date."

State v. Dixon, 127 Ariz. 554, 622 P.2d 501 (App. 1980). Where the indictment identified the alleged prior

convictions as Arizona felony offenses, included either a judgment order or minute entry substantiating the convictions, and the prosecutor effectively argued the probative value, the state met its burden of proof.

State v. Becerill, 124 Ariz. 535, 606 P.2d 25 (App. 1980). "The requirement that the prosecution carry the burden of proof in a Rule 609 hearing is a clear expression of congressional intent."

C. FINDINGS

State v. Beasley, 205 Ariz. 334, 339-40, 70 P.3d 463, 468-69 (App. 2003). Explicit findings are preferable but not necessary when the basis for the trial court's ruling appears in the record.

State v. Green, 200 Ariz. 496, 498, 29 P.3d 271, 273 (2001). A finding that a remote or stale conviction is admissible because its probative value substantially outweighs any prejudicial effect must be supported by specific facts and circumstances that should be disclosed on the record.

State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985). Probative value is based upon the theory that a major crime entails such a disregard for the rights of others that the witness will be untruthful if it is to his advantage.

State v. Davis, 137 Ariz. 551, 672 P.2d 480 (App. 1983). Probative value of prior convictions was carefully weighed against prejudicial effect upon defendant and one prior conviction was properly admitted to impeach defendant in child molestation case.

State v. Milburn, 135 Ariz. 5, 658 P.2d 805 (App. 1982). (Sentence partially vacated in *State v. Milburn,* 135 Ariz. 3, 658 P.2d 803 (1982); "[I]n all other respects the court's opinion is approved." "The only required on-the-record finding is a finding that the probative value of the evidence substantially outweighs the prejudicial effect." The trial court does not have to "set forth written findings upon which it makes a conclusion."

State v. Watkins, 133 Ariz. 1, 648 P.2d 116 (1982). "The rule only requires the trial court to independently weigh the probative value of the prior conviction against the prejudicial effect. In this case, the court did all that the rule requires."

State v. Aguirre, 130 Ariz. 54, 633 P.2d 1047 (App. 1981). "The fact that the court's finding does not also appear in the transcript is irrelevant. The court complied with the recommendation made in *State v. Cross*, 123 Ariz. 494, 600 P.2d 1126 (App. 1979). The court is not required to also explain the basis for its decision so long as it is supported by the facts before the court."

State v. Ferreira, 128 Ariz. 530, 627 P.2d 681 (1981). There was no abuse of discretion for the trial court to deny defendant's motion *in limine* where it had "implicity balanced the probative value of the two priors with their prejudicial effect and readily concluded that the convictions were admissible."

State v. Dixon, 127 Ariz. 554, 622 P.2d 501 (App. 1980). "Although an on-the-record finding based on specific facts and circumstances is preferred, a record which shows that the court did weigh the probative value and prejudicial effect in exercising its discretion will suffice."

State v. Pickett, 126 Ariz. 173, 613 P.2d 837 (App. 1980). Where the factors cited in the rule were "obviously considered by the court", there was not an abuse of discretion in allowing the use of a prior even though there were no explicit on the record findings.

State v. Ethridge, 126 Ariz. 8, 612 P.2d 59 (App. 1980). "Although the trial judge did not make an explicit finding of the Rule 609(a) determination, as urged by this court in an opinion issued subsequent to the trial of this case, see, *State v. Cross*, 123 Ariz. 94, 600 P.2d 1126 (App. 1979), it is clear that hearing on the issue was conducted. . . [and] we find no reversible error in the ruling here."

State v. Cross, 123 Ariz. 494, 600 P.2d 1126 (App. 1979). "[W]e urge trial judges, after a hearing on the record, to make an explicit finding that the prejudicial effect of the evidence is outweighed by its probative value before it admits prior convictions into evidence."

II. PROBATIVE VALUE vs. PREJUDICIAL EFFECT

A. TYPE OF CRIME

1. FELONIES

State ex rel. Romney v. Martin, 205 Ariz. 279, 281-82, 69 P.3d 1000, 1002-03 (2003). First or second offenses for personal possession or use of a controlled substance cannot be used to impeach.

State v. Hernandez, 191 Ariz. 553, 560, 959 P.2d 810, 817 (App. 1998). Witness can be impeached with two felonies, even if they were committed on the same occasion.

State v. Tyler, 149 Ariz. 312, 718 P.2d 214 (App. 1986). The defendant was properly impeached with two prior felonies even though the judgments had been vacated and probation was terminated early.

State v. Bojorquez, 138 Ariz. 495, 675 P.2d 1314 (1984). Trial court properly admitted defendant's numerous prior convictions, including two assault charges especially in light of the fact that defendant was claiming self-defense.

State v. McNair, 141 Ariz. 475, 687 P.2d 1230 (1984). Trial court did not abuse its Rule 609(a) discretion when it admitted defendant's 1980 and 1982 burglary convictions. The crimes were felonies with punishment of longer than a year in prison and defendant's credibility was very much at issue.

State v. Malloy, 131 Ariz. 125, 639 P.2d 315 (1981). "Rule 609(a)(1) recognizes that all felonies have some probative value in determining a witness' credibility upon the theory that a major crime entails such an injury to and disregard of the rights of other persons that it can reasonably be expected the witness will be untruthful if it is to his advantage."

State v. McElyea, 130 Ariz. 185, 635 P.2d 170 (1981). When the punishment for a prior conviction carried a sentence of more than a year, it was "unnecessary to deal with appellant's contention that a burglary conviction does not involve dishonesty or false statement."

State v. Aguirre, 130 Ariz. 54, 633 P.2d 1047 (App. 1981). "Any felony, even if it does not involve false statement or dishonesty, has probative value on the issue of the defendant's credibility."

Amburgey v. Holan Division of Ohio Brass Co., 124 Ariz. 531, 533, 606 P.2d 21, 23 (1980). Specific acts of misconduct cannot be shown to impeach the witness' credibility unless the misconduct results in a conviction for a felony.

2. MISDEMEANORS

State ex rel. Romney v. Martin, 205 Ariz. 279, 283, 69 P.3d 1000, 1004 (2003). Labeling a crime as a "felony" or "misdemeanor" is not the test for Rule 609. the key factor is whether the punishment was for one year or more imprisonment or not.

State v. Jones, 185 Ariz. 471, 485-86, 917 P.2d 200, 214-15 (1996). Misdemeanor theft and larceny charges do not involve dishonesty or false statements.

State v. Fierson, 146 Ariz. 287, 705 P.2d 1338 (App. 1985). "[T]rial court erred by precluding cross-examination for impeachment of a prosecution witness based on a misdemeanor conviction."

State v. Meeker, 143 Ariz. 256, 693 P.2d 911 (1984). Counsel was not ineffective for waiving Rule 609 hearing on defendant's priors because counsel had conferred with the defendant and decided to waive hearing because the priors were for minor crimes.

State v. Malloy, 131 Ariz. 25, 639 P.2d 315 (1981). "[A] prior misdemeanor conviction is admissible under 609(a)(2) only if the conviction is for an offense which involved an element of deceit or falsification."

State v. Johnson, 132 Ariz. 5, 643 P.2d 708 (App. 1981). Because "the victim's misdemeanor conviction for conspiracy to commit burglary did not involve 'dishonesty or false statement' as required to allow proof of conviction for a misdemeanor," it should not have been admitted for impeachment purposes.

3. CHARGED CRIME SAME AS PRIOR

State v. Bolton, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995). Trial court should sparingly admit evidence of prior convictions when prior convictions are similar to charged offense, or in appropriate cases, trial court may reduce risk of prejudice by admitting fact of prior conviction without disclosing nature of crime.

State v. Jackson, 139 Ariz. 213, 677 P.2d 1321 (App. 1983). Prior felony conviction properly admitted in drug case to impeach defendant's credibility, however, state could not elicit that it was a prior drug conviction.

State v. Woratzeck, 130 Ariz. 499, 637 P.2d 301 (App. 1981). Where the trial court "explicitly balanced the probative value and prejudicial effect, as mandated by Rule 609(a), . . . the ruling is reviewable only for abuse of discretion." "That appellant was being tried for burglary and that three priors were also for burglary did not render those prior convictions inadmissible *per se* on the issue of appellant's credibility."

State v. Dixon, 126 Ariz. 613, 617 P.2d 779 (App. 1980). "Prior convictions are not inadmissible *per se* on the issue of credibility merely because the offense involved is identical to that for which the defendant is on trial."

B. TIME CONSIDERATIONS

1. REMOTENESS

State v. Green, 200 Ariz. 496, 498, 29 P.3d 271, 273 (2001). Because convictions have increasingly less probative value on credibility as they become older, a "remote" or "stale" conviction-one that is over ten years old is admissible only if the proponent shows that its probative value substantially outweighs its prejudicial effect.

State v. Rendon, 148 Ariz. 524, 528, 715 P.2d 777, 781 (App. 1986). In prosecution for theft of property with value of over $1,000, defendant's two prior convictions for theft and for conspiracy and possession of marijuana were admissible for impeachment purposes, though convictions were between seven and eight years old, where defendant's credibility was central issue in case.

State v. Ennis, 142 Ariz. 311, 689 P.2d 570 (App. 1984). Ten-year-old prior convictions properly admitted for impeachment purposes because prosecutor was not allowed to disclose nature of the offense.

State v. Dalglish, 131 Ariz. 133, 639 P.2d 323 (1982). "The trial court, in denying defendant's motion *in limine*, conceded the prejudicial effect of the prior conviction, but held that the probative value of the prior conviction outweighed the prejudice. We agree. The prior felony conviction for the crime of conspiracy to distribute

heroin is five years old. While certainly prejudicial, we believe it had a direct bearing on defendant's credibility."

State v. Noble, 126 Ariz. 41, 612 P.2d 497 (1980). Trial court did not abuse its discretion in admitting two prior perjury convictions which were thirteen years old. "Defendant's prior convictions were for perjury, certainly dishonesty or false statements. The trial court did not err in finding that the probative value of defendant's two prior convictions for the purpose of impeachment outweighed the admittedly prejudicial effect of their admission."

State v. Still, 119 Ariz. 549, 582 P.2d 639 (1978). "We assume this conviction [which was 12-years-old] will be suppressed on retrial since it has been since September 1, 1977 inadmissible under the Arizona Rules of Evidence, Art. 6, Rule 609(b)."

2. FOR CRIME OCCURRING AFTER CHARGED CRIME AS PRIOR

State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980). "A witness may be impeached by a prior felony conviction even if the witness is also the defendant and the prior felony conviction was for a crime that occurred after the crime for which the witness is being tried as a defendant."

II APPEAL

A. PRESERVATION - WAIVER

State v. Pitre, 210 Ariz. 93, 95-96, 107 P.3d 939, 941-42 (App. 2005). A defendant must take the stand before he can challenge on appeal an adverse pretrial ruling allowing prior convictions to be admitted for impeachment purposes; without the defendant's testimony, a reviewing court cannot properly weigh the probative value of the testimony against the impact of the impeachment.

State v. Sisneros, 137 Ariz. 327, 670 P.2d 721 (1983). Defendant's motion *in limine* was granted, evidence was properly admitted, therefore, defendant cannot claim evidence was improperly admitted.

State v. Wilson, 128 Ariz. 422, 626 P.2d 152 (App. 1981). Since "a defendant has a right to adjust his trial strategy to adverse rulings", he does not waive the error by not testifying at trial.

State v. Taylor, 127 Ariz. 527, 622 P.2d 474 (1980). "[I]t is incumbent upon counsel to request a specific instruction on the limited admissibility of the prior if s/he is to preserve the alleged error for appeal." The trial court's failure to instruct, *sua sponte*, that the prior is for impeachment only and not to be considered as evidence of guilt is not fundamental error.

State v. Noble, 126 Ariz. 41, 612 P.2d 497 (1980). The defendant does not waive the right to appeal the ruling of the trial court by "drawing the sting" during the trial.

B. REVIEW STANDARD

State v. Romar, 221 Ariz. 342, 344-45, 212 P.3d 34, 36-37 (App. 2009). A trial court's decision whether to allow cross examination of a witness on specific instances of conduct, including convictions, is reviewed for an abuse of discretion.

State v. Woratzeck, 130 Ariz. 499, 637 P.2d 301 (App. 1981). Where the trial court "explicitly balanced the probative value and prejudicial effect, as mandated by Rule 609(a), . . . the ruling is reviewable only for abuse of discretion." "That appellant was being tried for burglary and that three priors were also for burglary did not render those prior convictions inadmissible *per se* on the issue of appellant's credibility."

State v. Soule, 121 Ariz. 505, 591 P.2d 993 (App. 1979). "It is our opinion that the determination, as required under Rule 609, of whether the probative value of admitting such evidence outweighs its prejudicial effect, is also a decision which must be left to the sound discretion of trial judge."

C. ERROR

1. INVITED

State v. Islas, 132 Ariz. 590, 647 P.2d 1188 (App. 1982). "Appellant now contends that because the actual crimes for which the witness had been convicted were different than those considered by the judge during the motion *in limine* hearing, the court did not properly use its discretion to decide whether the probative value of the prior conviction outweighed its prejudicial effect as required by Rule 609(a), Arizona Rules of Evidence, 17A A.R. S. A defendant who invites error at a trial may not then assign the same as error on appeal. *State v. Endreson,* 109 Ariz. 117, 506 P.2d 248 (1973). Generally, a party who participates in or contributes to an error cannot complain of it. *State v. Lopez,* 605 P.2d 178 (Mont. 1980). At the Rule 609(a) hearing it was appellant who informed the court of the crimes for which his witness had been convicted. He cannot complain now that the court ruled on the wrong convictions."

2. REVERSIBLE

State v. Green, 200 Ariz. 496, 501, 29 P.3d 271, 276 (2001). Erroneous admission of evidence concerning defendant's 15-year-old felony convictions was reversible error in sexual abuse prosecution; defendant's credibility was plainly at issue, as evidence presented was entirely testimonial, and jurors' questions during deliberations suggested that their knowledge of defendant's past convictions may have had some effect.

State v. Conroy, 131 Ariz. 528, 642 P.2d 873 (App. 1982). "[T]he trial court erred in preventing the impeachment of Mr. Loomis by refusing to allow evidence of his prior felony rape conviction. Such error here is reversible because Mr. Loomis was a principal state's witness and was the only adult who directly tied in the defendant to the commission of the crime. As could be expected, the recollection of the five-year-old victim was often contradictory and confusing. The credibility of Mr. Loomis was therefore of the utmost importance."

State v. Wilson, 128 Ariz. 422, 626 P.2d 152 (App. 1981). "Appellant's credibility was crucial to his misidentification defense and the error in not requiring the state to meet its Rule 609 burden is reversible."

State v. McClellan, 125 Ariz. 595, 611 P.2d 948 (App. 1980). Where the state "neither established that under the laws of Massachusetts the crimes were punishable by imprisonment of more than a year or that the crimes fit into the 'dishonesty or false statement' category so that the punishment was immaterial", reversible error was committed.

D. MISCELLANEOUS

State v. Hunter, 137 Ariz. 234, 669 P.2d 1011 (App. 1983). Prior felony conviction was admitted and the state was not allowed to prove the nature of the felony, defendant's argument that introduction of prior felony may have caused jury to ascribe to defendant a felony worse than murder was merely speculative and was no reason for error.

State v. Jackson, 139 Ariz. 213, 677 P.2d 1321 (App. 1983). State could impeach defendant with the prior conviction but the state could not elicit the specific nature of the offense that defendant had been charged with.

IV. EFFECT OF PARDON

State v. Tyler, 149 Ariz. 312, 315, 718 P.2d 214, 217 (App. 1986). Impeachment of defendant, with two

prior felony convictions was proper despite fact that probation had been terminated early, judgment had been vacated, and civil rights restored where defendant did not receive pardon, annulment, or certificate of rehabilitation.

Blankenship v. Duarte, 137 Ariz. 217, 669 P.2d 994 (App. 1985). Plaintiff in a civil case appealed the use of his prior convictions because they had been set aside, therefore, Rule 609(c) comes into play. A.R. S. 13-907 states: ". . . the conviction may be used as a conviction if such conviction would be admissible had it not been set aside and may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense. . ."

OTHER JURISDICTIONS

United States v. Blackshear, 568 F.2d 1120 (5th Cir. 1978). No objection under Rule 609 meant that a Rule 609 violation would not be constructed by the appellate court.

United States v. Moore, 556 F.2d 479 (10th Cir. 1977). While Rule 609 prohibits the use of an expunged prior, use of California expunged prior proper where California expungement statute permits the use of expunged convictions in subsequent criminal prosecutions.

United States v. Muscarella, 585 F.2d 242 (7th Cir. 1978). Bar misdemeanor charges and juvenile convictions over 10-years-old.

United States v. Askew, 584 F.2d 960 (10th Cir. 1978). Although decided under Rule 404, court holds that a prior conviction for the offense charged showed the Rule 404 litany.

United States v. Medical Therapy Sciences, Inc., 583 F.2d 36 (2nd Cir. 1978). Impeachment by fraud conviction entitled witness' party to good character evidence rehabilitation.

United States v. Brackett, 582 F.2d 1027 (5th Cir. 1978). Refusal to bar prior bank robbery did not prevent defendant from testifying.

United States v. Williams, 577 F.2d 188 (2nd Cir. 1978). Another case where prior conviction was properly admitted for Rule 404 purposes, even though defendant did not testify.

United States v. Langston, 576 F.2d 1138 (5th Cir. 1978). Defendant claimed lacked requisite intent to rob, three prior convictions for robbery impeached him somewhat.

United States v. Reed, 572 F.2d 412 (2nd Cir. 1978). Defendant's state prior admissible in federal court.

United States v. Wiggins, 566 F.2d 944 (5th Cir. 1978). Refused to make per se rule heroin distribution prior did not involve dishonesty.

United States v. Oakes, 565 F.2d 170 (1st Cir. 1977). Manslaughter used for impeachment.

United States v. Wright, 564 F.2d 785 (8th Cir. 1977). Couldn't use misdemeanor prostitution "honest" conviction, to impeach state's witness.

United States v. Thompson, 559 F.2d 552 (9th Cir. 1977). Bar state's witness prior marijuana misdemeanor conviction.

United States v. Ramos Algarin, 584 F.2d 562 (1st Cir. 1978). Bar state's witness 32-year-old prior.

United States v. Mahler, 579 F.2d 730 (2nd Cir. 1978). Over 10-year-old conviction already admitted under

404(b), any error under 609(b) is harmless.

United States v. Williamson, 567 F.2d 610 (4th Cir. 1977). Court refuses to adopt 10-year limit for special offender status.

United States v. Little, 567 F.2d 346 (8th Cir. 1977). Over 10-year-old conviction admitted.

United States v. Bynum, 566 F.2d 944 (5th Cir. 1978). Bar 16 and 20-year-old state's witness convictions.

United States v. Corey, 566 F.2d 429 (2nd Cir. 1977). Compared with Rule 404(b).

United States v. Mullins, 562 F.2d 999 (5th dir. 1977). Defendant's voluntary flight tolled the ten-year limitation.

United States v. Trejo-Zambrano, 582 F.2d 460 (9th Cir. 1978). Prosecutor performed disclosure duty by giving copy of prior and FBI rap sheet to defense attorney, didn't change defense attorney's burden of discovering Youth Convictions Act prior had been vacated.

United States v. Wiggins, 566 F.2d 944 (5th Cir. 1978). Release alone is not equivalent to a certificate of rehabilitation.

United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977). Fact state couldn't mention prior, but defense attorney did, doesn't show incompetance.

United States v. DiNapoli, 557 F.2d 962 (2nd Cir. 1977). Restoration of rights to aid rehabilitation does not qualify as finding of rehabilitation or innocence.

United States v. Wilson, 556 F.2d 1177 (4th Cir. 1977). German rape conviction properly admitted.

United States v. Apuzzo, 555 F.2d 306 (2nd Cir. 1977). Misdemeanor conviction for possession and transportation of untaxed cigarettes properly admitted since any defrauding revenue crime stands high on list affecting veracity.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Source: Federal Rules of Evidence, Rule 610.

Cross Reference

Liberty of conscience; religious freedom: See A.R.S. Const. Art. 2, § 12.

ARIZONA CASES

State v. Towery, 186 Ariz. 168, 178, 920 P.2d 290, 300 (1996). Counsel for murder defendant was properly precluded from cross-examining accomplice, who was testifying for state, regarding accomplice's belief in satanism; while it was remotely possible that accomplice might have been driven by satanic force to commit crime, only hint of satanic motive was accomplice's dialing of sixes while making mock telephone call, which had little probative value, and accomplice's claim that he used to believe in occult indicated that alleged satanic altar in his home no longer had any religious

significance to him.

State v. West, 168 Ariz. 292, 296, 812 P.2d 1110, 1114 (App. 1991). Religious beliefs of witness may not be used during direct examination to enhance credibility or to impeach witness by showing presence or absence of religious beliefs.

State v. West, 168 Ariz. 292, 296, 812 P.2d 1110, 1114 (App. 1991). Reference to religion by prosecutor during cross-examination of defendant is proper when defense uses religion to justify conduct.

State v. Crum, 150 Ariz. 244, 246, 722 P.2d 971, 973 (App. 1986). Prosecutor's references to defendant as "Father Tim" were means of identifying defendant and had nothing to do with defendant's credibility; and thus, those references did not violate this rule.

State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981). Where the credibility of the victim was crucial, reference to her strong religious background during direct examination of her was reversible error. See also Ariz. Const. Art. 2, § 12.

State v. Marvin, 124 Ariz. 555, 606 P.2d 406 (1980). "The testimony concerning religious beliefs was intended to bolster appellant's credibility relative to the theory of provocation and lack of premeditation. Since the state cannot assail a witness' credibility because of religious beliefs or lack thereof, neither may a witness seek to enhance his testimony in reliance thereon."

OTHER JURISDICTIONS

Government of Virgin Islands v. Peterson, 553 F.2d 324 (3rd Cir. 1977). Rule 610 prohibits using religion to enhance credibility, thus proper to refuse to let defense attorney ask witness if the defendant was a member/adherent of a nonviolent religion.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. The court may impose reasonable time limits on the trial proceedings or portions thereof.

(b) Scope of cross-examination. A witness may be cross-examined on any relevant matter.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. ordinarily, leading questions should be permitted on cross-examination. A party may interrogate an unwilling, hostile or biased witness by leading questions. a party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party or a witness whose interests are identified with an adverse party and interrogate that person by leading questions. The witness thus called may be interrogated by leading questions on behalf of the adverse party also.

Comment

The last sentence of (c) changes the Arizona Supreme Court's holding in *J. & B. Motors, Inc., v. Margolis*, 75 Ariz. 392, 257 P.2d 588 (1953).

Source: Federal Rules of Evidence, Rule 611.

Cross Reference

Order of trial by jury: See 16 A.R.S. Rules of Civil Procedure, Rule 39(b).

Application to depositions: See 16 A.R.S. Rules of Civil Procedure, Rule 30(c).

Application to criminal actions and proceedings: See 17 A.R.S. Rules of Criminal Procedure, Rule 19.3.

Arizona Rule of Evidence, Rule 104.

ARIZONA CASES

I. SCOPE OF CROSS-EXAMINATION

A. WIDE LATITUDE

State v. Carbajal, 128 Ariz. 306, 625 P.2d 895 (1981).In Arizona, wide latitude is allowed during cross-examination and it is left up to the trial judge's discretion as to the limits of cross-examination."

B. RIGHT TO CROSS-EXAMINATION

State v. Lee, 189 Ariz. 590, 602, 944 P.2d 1204, 1216 (1997). Defendant has no right to limit how he would be cross-examined.

State v. Woods, 141 Ariz. 446, 687 P.2d 1201 (1984). Defendant's rights were not violated because he was not allowed to cross-examine a witness about a prior bad act.

State v. Parris, 144 Ariz. 219, 696 P.2d 1368 (App. 1985). Trial judge properly allowed prosecutor to cross-examine a witness about a statement the defendant had made to her because the defendant's credibility was at issue.

State v. Navarro, 132 Ariz. 340, 645 P.2d 1254 (App. 1982). "Although the right to cross-examination is basic, it is not absolute as the trial court has discretion to limit the scope. *United States v. LaRiche*, 549 F.2d 1088 (6th Cir. 1977), cert. denied 430 U.S. 987, 97 S.Ct. 1687, 52 L.Ed.2d 383; *State v. Kalamarski*, 27 Wash.App. 787, 620 P.2d 1017 (1981). The trial court in limiting cross-examination is thus entitled to rely upon what the record before it reveals to be the relevancy of the cross-examination attempted. *State v. Taylor*, 9 Ariz.App. 290, 451 P.2d 648 (1969)."

State v. Williams, 132 Ariz. 153, 644 P.2d 889 (1982). "Arizona is committed to the policy of permitting wide latitude in the scope of cross-examination to comport with the confrontation right. *State v. Dunlap*, 125 Ariz. 104, 608 P.2d 41 (1980). The right of cross-examination, however, is not without limitation. The control of all examination is within the sound discretion of the trial court."

State v. Gretzler, 126 Ariz. 60, 612, P:2d 1023 (1980). "We have held that the 'absolute right to cross-examine "within the proper bounds" does not license the defendant for a fishing expedition into a completely irrelevant matter.' *State v. Shaw*, 93 Ariz. 40, 44378 P.2d 487, 490 (1963)."

C. LIMITATIONS

State v. Riggs, 189 Ariz. 327, 333, 942 P.2d 1159, 1166 (1997). Defendant's fundamental right to confront

and cross-examine adverse witnesses is limited to presentation of matters admissible under ordinary evidentiary rules, including relevance.

Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984). The prosecutor should object if he believes that the defendant is engaging egregious conduct; he should not engage in his own egregious conduct.

State v. Asbury, 145 Ariz. 381, 701 P.2d 1189 (App. 1984). During the sentencing hearing defense was not allowed to cross-exam victim about being psychosomatic.

State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (1982). "We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies." No such showing was made here and the trial court did not abuse its discretion in excluding cross-examination regarding the witness's psychiatric problems.

State v. Rodgers, 134 Ariz. 296, 655 P.2d 1348 (App. 1982). Since defendant was clearly indicted under A.R.S. § 13-3209(4), the issue of "who induced, compelled, or encouraged Mrs. Williams to reside in the Rodgers household was not an issue which the state was required to prove under the indictment. Therefore evidence pertaining to any such inference was of marginal, if any, relevance." Emphasis in the original.

State v. Rodgers, 134 Ariz. 296, 655 P.2d 1348 (App. 1982). Trial Court did not abuse its discretion when it ruled that evidence that the victim was a confidential informant was irrelevant to the issue of defendant's guilt or innocence and therefore inadmissible.

State v. Rodgers, 134 Ariz. 296, 655 P.2d 1348 (App. 1982). Trial court did not abuse its discretion when it sustained state's objection to the question of how many acts of prostitution the victim-witness had committed in 1975. She had already admitted that she was a prostitute and earned her living as such in 1975 and "(m)ore importantly the question had nothing to do with Williams' activities during the two years prior to 1980, the time of the alleged offenses." Emphasis in the original.

State v. Rodgers, 134 Ariz. 296, 655 P.2d 1348 (App. 1982). It was not error for the trial court to sustain the state's objection to the defendant asking the victim if her husband had supported her during the two years in question. "We agree that the activities of Mrs. Williams' husband for the two years in question is immaterial to the question of what Mrs. Williams' behavior was during that time period." Emphasis in the original.

State v. Piatt, 132 Ariz. 145, 644 P.2d 881 (1981). "The United States Supreme Court, however, has never instructed the states that the right of confrontation requires a witness to submit to any type of mental or physical examination, and we have held that whether a witness should be required to undergo a mental examination is usually a matter for the sound discretion of the trial judge and his decision will not be upset absent clear and manifest error."

State v. McElyea, 130 Ariz. 185, 635 P.2d 170 (1981). "We are not convinced that a cross-examination of the witness relative to a subsequent criminal charge not the subject of any plea agreement would have revealed any bias or interest that the witness might have in testifying against a former codefendant. The trial court did not err in limiting the scope of cross-examination to this extent."

State v. Wilson, 128 Ariz. 422, 626 P.2d 152 (App. 1981). There was no error in granting the state's motion *in limine* to preclude the defense from cross-examining an undercover narcotics officer on his alleged misidentification of another defendant arrested in the same investigation.

D. OPENING THE DOOR

State v. Lindeken, 165 Ariz. 403, 406-07, 799 P.2d 23, 26-27 (App. 1990). State did not open door to manslaughter defendant's substantive use of her statements to her doctor experts regarding self-defense

when State cross-examined experts concerning facts told them by defendant, as State had right to fully cross-examine experts regarding statements, which were admitted only for use as basis of experts' opinions concerning defendant's sanity.

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981). Questions during cross-examination about defendant's decision to sell heroin were not inappropriate because "appellant opened the door to this line of questioning during his opening statement in which his counsel told the jury that appellant was an addict, that evidence would be presented regarding heroin addiction, and that selling drugs is among the ways an addict can support his habit."

E. VOIR DIRE CONSIDERATIONS DIFFERENT THAN CROSS-EXAMINATION

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981). "[W]e decline to equate a foundation-seeking question on voir dire with cross-examination."

II. LEADING QUESTIONS

State v. Agnew, 132 Ariz. 567, 647 P.2d 1165 (App. 1982). "The questions to which the appellant objected were those asked of the investor-victims to show their reliance on the false representations. For example, 'Had you known the trust was not insured would you have invested?' or, 'Had you known you were going to be paid principal rather than interest ...?' or 'Had you known the trust was insolvent ...?' These are not leading questions. A leading question is one that suggests the answer, such as, the cat was black, wasn't it? A question is not leading just because the answer is obvious."

State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (App. 1979). In a complicated case involving "land fraud and securities fraud at a highly sophisticated and care-fully developed level," the trial court did not abuse its discretion in overruling defense objections to a few non-prejudicial leading questions.

OTHER JURISDICTIONS

United States v. Luna, 585 F.2d 1 (1st Cir. 1978). Limit cross-examination of favorable deals obtained by state's witness.

United States v. Carr, 584 F.2d 612 (2nd Cir. 1978). Limit irrelevant cross-examination about failure to tell prosecutor of defendant's statements.

United States v. Colyer, 571 F.2d 941 (5th Cir. 1978). Trial court invoking 5th for witness regarding homosexuality within this rule.

United States v. Kizer, 569 F.2d 504 (9th Cir. 1978). Where the witness' hospitalization for drug treatment was not logically related to motive, etc., it was proper to limit cross.

United States v. Anthony, 565 F.2d 533 (8th Cir. 1977). Court can require proof of conspiracy first, having witnesses testify twice doesn't limit cross.

United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977). Where defense of duress was clear, rebutting in case in chief was not prejudicial. The evidence, not it's timing was prejudicial.

United States v. Southers, 583 F.2d 1302 (5th Cir. 1978). It was within the court's discretion to bar defense's good character evidence during cross-examination of state's witness.

NOTE: The Federal Rules of Evidence adopted a restricted cross-examination rules, Arizona adopted a wide open rule.

United States v. Hansen, 583 F.2d 325 (7th Cir. 1978). Barring father/defendant from leading son/codefendant did not violate Sixth Amendment, son was not hostile witness, he tried to exonerate father.

United States v. Hodges, 556 F.2d 366 (5th Cir. 1977). Refusal to allow defense attorney to ask 2nd witness about 1st witness' appearance was proper. Intent was to get 2nd witness' opinion that 1st witness was high on drugs, where 1st witness had admitted smoking marijuana.

United States v. Littlewind, 551 F.2d 244 (8th Cir. 1977). Leading questions to 13 and 14-year-old Indian rape victims were proper since their reticence in testifying was understandable.

United States v. Jackson, 549 F.2d 517 (8th Cir. 1977). Proper, with adequate safeguards, to allow a narc to testify several times as case progressed chronologically.

United States v. Demchak, 545 F.2d 1029 (5th Cir. 1977). Reversible error to call father because son couldn't cross-examine without causing father problems on other criminal charges.

RULE 612. WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying, either --

(1) Before testifying, if the court in its discretion determines it is necessary in the interests of justice, or

(2) while testifying,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the action, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Comment

Subparagraphs (1) and (2) of Federal Rule 612 have been reversed in order to clarify the intent of the rule which is to invoke the court's discretion concerning matters used before testifying and to have production as a matter of right of materials used while testifying. The word "action" in the second sentence of the rule replaced "testimony" in the Federal Rule to accord with the broader scope of cross-examination used in Arizona.

Source: Federal Rules of Evidence, Rule 612.

Cross Reference

Uniform Business Records Act: See A.R.S. §S 12-2261 and 12-2262.

Application to criminal actions and proceedings: See 17 A.R.S. Rules of Criminal Procedure, Rule 19.3.

Disclosure of statements by state in criminal actions: See 17 A.R.S. Rules of Criminal Procedure, Rule 15.1.

Disclosure of exhibits prior to trial: See 17 A.R.S. Uniform Rules of Practice of the Superior Court of Arizona, Rule VI.

ARIZONA CASES

State v. Ortega, 220 Ariz. 320, 329-30, 206 P.3d 769, 778-79 (App. 2008). Prosecutor was permitted to use transcript of witness' interview with police about alleged threats defendant made against witness to refresh witness' recollection, in trial for threatening and intimidating and other crimes, after witness testified that he did not remember his statement to police, and to rebut witness' testimony that defendant never threatened witness' mother.

State v. Doty, 110 Ariz. 348, 350, 519 P.2d 47, 49 (1974). When law enforcement officer testifies that he has used report to refresh his memory, defense may examine report for purposes of impeachment.

State v. Hall, 18 Ariz.App. 593, 596, 504 P.2d 534, 537 (1972). All that is necessary in order to permit witness to refresh his recollection is that it appears that the writing or object serves to revive the independent recollection of the witness.

OTHER JURISDICTIONS

United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975). Police report used by defense attorney to refresh witness' memory could be admitted by request of either state or jury.

RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Source: Federal Rules of Evidence, Rule 613.

Cross Reference

17 A.R.S. Rules of Criminal Procedure, Rule 19.3(b).

NOTE: Some federal cases state that a witness cannot be called just to impeach the witness. *State v. Acree, infra*, seems to settle the problem; *Acree* eliminates the need to show surprise prior to impeaching your own witness. In addition, Arizona adopted a much broader Rule 801 than the federal rule.

ARIZONA CASES

I EXAMINING WITNESS ABOUT PRIOR STATEMENT

A. FOUNDATIONAL REQUIREMENTS

State v. Rutledge, 205 Ariz. 7, 10-11, 66 P.3d 50, 53-54 (2003). The requirements that a witness be afforded an opportunity to explain or deny making a prior inconsistent statement and that opposing party be afforded an opportunity to interrogate the witness before the statement can be admitted can be dispensed with only if justice so requires

State v. Hines, 130 Ariz. 68, 633 P.2d 1384 (1981). The previous foundational requirements for impeachment with prior inconsistent statements asking the witness whether he made the alleged statement, giving its substance and naming the time, the place, and the person to whom made "have been explicitly abolished by Rule 613(a)", and "the only requirement is that upon request, the statement must be shown or disclosed to opposing counsel."

B. INCONSISTENCY DETERMINATION

State v. Salazar, 216 Ariz. 316, 319, 166 P.3d 107, 110 (App. 2007). "The court has considerable discretion in determining whether a witness's evasive answers or lack of recollection may be considered inconsistent with that witness's prior out-of-court statements."

State v. Hines, 130 Ariz. 68, 633 P.2d 1384 (1981). "'[I]nconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done.'" Quoting with approval IIIA Wigmore, Evidence S 1040 [Chadbourn Rev. 1970].

C. BASIS IN FACT

State v. Hines, 130 Ariz. 68, 633 P.2d 1384 (1981). If the cross-examiner has a basis in fact for the questions, it is not impeachment by insinuation.

II. EXTRINSIC EVIDENCE

A. REQUIREMENTS

State v. Rutledge, 205 Ariz. 7, 10-11, 66 P.3d 50, 53-54 (2003). The requirements that a witness be afforded an opportunity to explain or deny making a prior inconsistent statement and that opposing party be afforded an opportunity to interrogate the witness before the statement can be admitted can be dispensed with only if justice so requires.

State w. Woods, 141 Ariz. 446, 453, 687 P.2d 1201, 1208 (1984). Admissibility in criminal prosecution of extrinsic proof of an admitted inconsistent statement is in the discretion of the trial court.

State v. Emery, 131 Ariz. 493, 642 P.2d 838 (1982). "[W]e interpret Rule 613(b) to set forth two separate requirements: (1) that the witness be allowed to explain; and (2) that the opposite party be permitted to interrogate him. Either or both of these requirements can be dispensed with only if 'justice so requires.'"

State v. Emery, 131 Ariz. 493, 642 P.2d 838 (Ariz. 1982). "In the instant case, Rule 613(b) does not bar the prosecution from introducing a prior inconsistent statement of its own witness even though it does not give that witness the chance to explain. In so doing, however, the prosecution takes the risk that the opposing party will choose not to cross-examine the witness since we have previously stated that the opposing party cannot be forced to provide the witness with an opportunity to explain. Since the witness never received an opportunity to explain, Gilliam's prior inconsistent statement was inadmissible."

State v. Hines, 130 Ariz. 68, 633 P.2d 1384 (1981). When a witness testified that she did not remember making the prior statement, the prosecutor was not required to prove the making of the statement through extrinsic

evidence.

B. TAPE RECORDING

State v. Rutledge, 205 Ariz. 7, 10, 66 P.3d 50, 53 (2003). Entire 55-minute videotape of witness's police interview was admissible at murder trial as prior inconsistent statement, despite defendant's contention that most of videotape was consistent with witness's testimony or was explained by witness; witness claimed he was intoxicated, confused, and intimidated during interview, and there were several inconsistencies between witness's trial testimony and videotape.

State v. Woods, 141 Ariz. 446, 687 P.2d 1201 (1984). The trial court has discretion to decide whether to admit extrinisic evidence of prior inconsistencies which have been acknowledged by the witness. Rule 613. The court should allow the ordinarily inadmissible evidence if the evidence has substantive use, Rule 801(d), and will assist the jury to decide which statement is correct. The court did not abuse its discretion under this test when it did not allow the defense to play a tape recording of an earlier inconsistent statement by the state's only eyewitness to the murder.

State v. Acree, 121 Ariz. 94, 588 P.2d 836 (1978). Prosecutor's use of a tape recording of the witness' prior statement was not improper. He gave the witness an opportunity to explain or deny her statements to police and "the defense counsel had an opportunity, on cross-examination, to bring out any further explanations he felt necessary."

OTHER JURISDICTIONS

United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977). Rule mentioned as example of how to impeach.

United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978) Judge's statement defense attorney should call FBI agent to impeach necessitated by defense attorney's attempts to show witness' evidence of prior statement.

United States v. Cline, 570 F.2d 731 (8th Cir. 1978). Proper to call witness to rebut defendant who said he could not remember whether he told witness he sold the gun.

United States v. King, 560 F.2d 122 (2nd Cir. 1977). Document proper under 613 could be excluded under 403, where defense attorney failed to show it to witness.

United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977). Impeachment can come before witness is given chance to explain or deny statement, as long as he gets a chance to.

United States v. DiNapoli, 557 F.2d 962 (2nd Cir. 1977). Barring extrinsic impeachment, and refusing to recall witness not abuse of discretion, where defense attorney failed to lay foundation at proper time.

United States v. Parker, 549 F.2d 998 (5th Cir. 1977). Proper to rebut witness' statement that defendant lived with witness in 1968 with defendant's statement that in 1968 he didn't know witness, where defendant did not take stand.

Osborne v. United States, 542 F.2d 1015 (8th Cir. 1976). Proper to impeach defendant's mother since she had chance to explain statement.

United States v. Morlang, 531 F.2d 183 (4th Cir. 1975). Cannot call witness just to impeach him with a prior inconsistent statement. But see *United States v. Leslie*, 542 F.2d 285 (5th Cir., 1976) Prosecutor had judge call witnesses who were going to change story, then impeached them. [If this plan is adopted, see the NOTE following *Leslie, infra,* at Rule 614].

United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975). Police report and radio log, once established as business records, admissible to impeach witness by his statements therein.

United States v. Starks, 515 F.2d 112 (3rd Cir. 1975). No abuse of discretion to allow rehabilitation by prior consistent statement after impeachment.

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) *Calling by court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Source: Federal Rules of Evidence, Rule 614.

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State v. Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (App. 1995). Where jurors, who had been encouraged during trial to ask questions, sent notes after beginning of deliberations asking whether photographs were in the same format as when they were presented to the victim and asking whether the defendant had a limp now or at the time of the attack, court properly recalled detective as the court's witness to answer the questions, allowing attorneys an opportunity to examine him.

State v. LeMaster, 137 Ariz. 159, 669 P.2d 592 (App. 1983). The jury can participate in questioning witnesses as long as certain guidelines are followed.

State v. LeMaster, 137 Ariz. 159, 669 P.2d 592 (App. 1983). Questions from the jury must be relevant, non-biased and defense counsel must have an opportunity to object.

State v. Vaughan, 124 Ariz. 163, 602 P.2d 831 (App. 1979). "In view of the conflicting statements and the codefendant's unwillingness to testify against appellant, it was not error to call him as the court's witness, subjecting him to cross-examination by all parties."

State v. Ferrari, 112 Ariz. 324, 541 P.2d 921 (1975). Pre-Rules, but holds that court may call witnesses so that prosecutor can impeach them, citing a Ninth Circuit case.

NOTE: It might be a good idea to give a cautionary instruction, suitably phrased, about why the court called the witness and that their testimony had neither more nor less credence simply because the court called them.

OTHER JURISDICTIONS

United States v. Cheatwood, 575 F.2d 821 (10th Cir. 1978). Judge's zealous questioning of confused witness did not amount to assuming prosecutor's role.

United States v. Auten, 570 F.2d 1284 (5th Cir. 1978). Court's questioning did not elicit hearsay, sought to determine admissibility of witness' knowledge of conspiracy.

United States v. Nelson, 570 F.2d 258 (8th Cir. 1978). In instructing jury, judge's questions were not opinion,

bounds of judicial impartiality were not exceeded.

United States v. Cornfield, 563 F.2d 967 (9th Cir. 1977). Trial judge may clarify ambiguities and issues for jury as long as he maintains air of impartiality.

United States v. Latimer, 548 F.2d 311 (10th Cir. 1977). Proper for judge to question defense witness where truth otherwise obscured and glaring inconsistency between witness and state's eyewitness identity of defendant existed.

United States v. Wilson, 447 F.2d 1 (9th Cir. 1971). Not abuse of discretion for court to call witness implicated in the crime.

United States v. Leslie, 542 F.2d 285 (5th Cir. 1976). Proper for judge to call three witnesses state didn't want to call, because they told prosecutor they would change their FBI statements, and allow state to impeach them.

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. this rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence shown by a party to be essential to the presentation of his cause, or (4) a victim of a crime, as defined in rule 39(a), rules of criminal procedure, who wished to be present during proceedings against the defendant.

Source: Federal Rules of Evidence, Rule 615.

Cross Reference

17 A.R.S. Rules of Criminal Procedure, Rule 9.3.

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State v. Uriarte, 194 Ariz. 275, 277-78, 981 P.2d 575, 577-78 (App. 1998). Crime victim who is a minor has right to parent's presence at trial, even if parent is to testify and rule allowing exclusion of witnesses from courtroom has been invoked.

State v. Williams, 183 Ariz. 368, 379-80, 904 P.2d 437, 448-49 (1995). "Person" within meaning of rule entitling witness to remain in courtroom if that person's presence is essential to presentation of party's cause includes plural and means any person, not one person; thus, multiple witnesses may have right to remain in courtroom.

State v. Williams, 183 Ariz. 368, 379-80, 904 P.2d 437, 448-49 (1995). If witness' presence is essential to presentation of case, court lacks authority under rule to exclude that person from trial.

OTHER JURISDICTIONS

United States v. Juarez, 573 F.2d 267 (5th Cir. 1978). Barring defense witnesses during final argument and instructions reasonable and within the Sixth Amendment.

United States v. Brown, 547 F.2d 36 (3rd Cir. 1976). No right under Federal Rule to exclude witness prior to prosecutor's opening statement.

United States v. Willis, 525 F.2d 657 (5th Cir. 1976). No error to permit FBI violator of rule to testify where his story didn't change and the testimony was cumulative.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Introductory Note: Problems of Opinion Testimony

The rules in this article are designed to avoid unnecessary restrictions concerning the admissibility of opinion evidence. However, as this note makes clear, an adverse attorney may, by timely objection, invoke the court's power to require that before admission of an opinion there be a showing of the traditional evidentiary prerequisites. Generally, it is not intended that evidence which would have been inadmissible under pre-existing law should now become admissible.

A major objective of these rules is to eliminate or sharply reduce the use of hypothetical questions. With these rules, hypothetical questions should seldom be needed and the court will be expected to exercise its discretion to curtail the use of hypothetical questions as inappropriate and premature jury summations. Ordinarily, a qualified expert witness can be asked whether he has an opinion on a particular subject and then what that opinion is. If an objection is made and the court determines that the witness should disclose the underlying facts or date before giving the opinion, the witness should identify the facts or date necessary to the opinion.

In jury trials, if there is an objection and if facts or date upon which opinions are to be based have not been admitted in evidence at the time the opinion is offered, the court may admit the opinion subject to later admission of the underlying facts or data; however, the court will be expected to exercise its discretion so as to prevent the admission of such opinions if there is any serious question concerning the admissibility, under Rule 703 or otherwise, or the underlying facts or data.

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Source: Federal Rules of Evidence, Rule 701.

ARIZONA CASES

I. GENERAL RULE

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). "The opinions of a witness regarding questions of truthfulness or guilt are generally inadmissible for a variety of reasons. One reason is that Rule of Evidence 701, codifying and, hopefully, bringing reason to a morass of prior law, forbids lay testimony 'in the form of opinions or inferences' except with respect to those which are '(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony. . .(Emphasis added.)"

II. BASIS OF OPINION

Boomer v. Frank, 196 Ariz. 55, 61, 993 P.2d 456, 462 (App. 1999). Lay witnesses who were not watching car as it approached stop sign could properly offer opinion in negligence action that it failed to stop, based on car's speed as it went through intersection.

Lewis v. N.J. Riebe Enterprises, Inc., 170 Ariz. 384, 396, 825 P.2d 5, 17 (1992). Trial court did not abuse discretion by permitting carpenter employed by subcontractor, seeking personal injury compensation for accident allegedly caused by contractor's failure to properly exercise retained supervision over project, to testify that carpenters were traditionally unemployed three months out of year, even though employee had been unemployed for six months prior to gaining employment on project in question.

State v. Salazar, 160 Ariz. 570, 571, 774 P.2d 1360, 1361 (App. 1989). Testimony of store detective in shoplifting case, as to value of merchandise stolen, was inadmissible because proper foundation as to his knowledge of price was not established.

State v. Gortarez, 141 Ariz. 254, 686 P.2d 1224 (1984). Trial court properly allowed police officer's to give opinion that the voice on the electronic surveillance tape was defendant's.

State v. Crivellone, 138 Ariz. 437, 675 P.2d 697 (1983). Trial court correctly prohibited the codefendant from giving his opinion that the shooting of the robbery victim was accidental.

State v. Conn, 137 Ariz. 152, 669 P.2d 585 (App. 1985). Rape victim's testimony that her assailant was older than 17 years was admissible even though she was unable to identify the defendant because he put a towel over her head when she awakened. "The victim testified to the words spoken; that the assailant had a mature way of speaking and to his conduct during the rape. Her opinion of his age was clearly admissible. It was not conjecture or speculation as in *United States v. Cox*, 633 F.2d 871 (9th Cir. 1980), cited by appellant."

State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981). Since the detective's opinion of the victim's reputation for involvement with organized crime was based on contacting two other detectives, neither of whom knew the victim or about him, it was inadmissible hearsay. "Detective Quaife's testimony was not an opinion based on personal knowledge as to Ameche's character or reputation; rather, it was a statement of information known to or gathered by others not subject to cross-examination."

III. EXAMPLES

A. PERSONALITY CHANGES

State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981). Testimony from "several witnesses acquainted with the victim . . . that the victim experienced marked personality changes after the incident" was admissible. Their opinions "that 'something pretty serious' happened to the victim on the date of the offenses" was also admissible.

B. CHARACTER TRAITS

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). "Character traits may be established by both expert and non-expert opinion."

C. MENTAL CONDITION

State ex rel. Hamilton v. City Court of City of Mesa, 165 Ariz. 514, 517-1 8, 799 P.2d 855, 858-59 (1990). Lay witnesses may give an opinion about a person’s intoxication.

State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (App. 1980). Trial court did not err in "admitting the opinion of an officer about the victim's mental condition, responsiveness and competence after the assault. Lay witnesses may properly testify as to opinions rationally based on their perceptions."

OTHER JURISDICTIONS

United States v. McClintic, 570 F.2d 685 (8th Cir. 1978). State's witness' opinion defendant knew goods were fraudulently obtained, was a "shorthand rendition" of facts.

United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978). Opinion that anyone trying to flee out back would have been seen obviously referring to when witness was watching the back.

United States v. Butcher, 557 F.2d 666 (9th Cir. 1977). Police officers and parole officer identifying defendant as person in photo not to be encouraged, but did not constitute an abuse of discretion.

United States v. Smith, 550 F.2d 277 (5th Cir. 1977). Proper for employee to testify boss knew of the law he violated.

United States v. Davis, 546 F.2d 583 (5th Cir. 1977). Proper to exclude the prison record of defendant showing rehabilitation progress where the defense of coercion to an escape charge was raised.

United States v. Robinson, 544 F.2d 110 (2nd Cir. 1976). Reversible error to exclude testimony of warden that person in photo was an "at large" fugitive, rather than defendant.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Source: Federal Rules of Evidence, Rule 702.

ARIZONA CASES

I. IN GENERAL

Pipher v. Loo, 221 Ariz. 399, 403-04, 212 P.3d 91, 95-96 (App. 2009). Opinion evidence must be relevant, the witness must be qualified, and the evidence must be the kind that will assist the jury.

Logerquist v. McVey, 196 Ariz. 470, 480, 1 P.3d 113, 123 (2000). Opinion testimony on human behavior is admissible when relevant to an issue in the case, when such testimony will aid in understanding evidence outside the experience or knowledge of the average juror, and when the witness is qualified by knowledge, skill, experience, training, or education.

Rourk v. State, 170 Ariz. 6, 14, 821 P.2d 273, 281 (App. 1991). Ultimate question on admissibility of expert testimony is whether expert can provide appreciable help to jury.

State v. Roberts, 139 Ariz. 117, 677 P.2d 280 (App. 1983). Expert testimony should be admitted of jury is not qualified to determine intelligently and to the best possible degree a particular issue without further enlightment.

State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983). Expert testimony must conform to generally accepted explanatory theory and probative value must outweigh prejudicial effect.

State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983). There must be clear abuse of discretion to warrant reversal where trial court has determined competence to testify as an expert.

State v. Mack, 134 Ariz. 89, 654 P.2d 23 (App. 1982). Decision to admit expert testimony is within discretion of trial court.

State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980). "Rule 702 has not changed the case law developed in this area."

II. EXPERT TESTIMONY ADMISSIBLE

A. EXPERT'S KNOWLEDGE

State v. Davolt, 207 Ariz. 191, 211, 84 P.3d 456, 476 (2004). State's witness was qualified to testify in capital murder prosecution as expert on blood sample analysis; witness had been employed as a serologist in the DNA unit for one and one-half years, she received a Bachelor's degree in chemistry and had taken postgraduate classes in genetics and population statistics, she had performed blood analysis tests thousands of times, and she had worked on more than 100 cases.

State v. Murray, 184 Ariz. 9, 29, 906 P.2d 542, 562 (1995). Detective's experience was sufficient to qualify him as expert in footprint comparisons where his background included extensive tracking in criminal investigations, qualifying in both federal and state courts as expert, tracking livestock, military training in examination of enemy trails, hunting, trapping, training from experienced Department of Public Safety Officer, teaching numerous classes in tracking and footprint identification, experience in training shoe and boot identification, determinations of matches on hundreds of occasions, and reading articles.

State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986). The state's expert could properly describe characteristics of child molest victims, however, could not comment on a victim's truthfulness.

State v. Carreon, 151 Ariz. 615, 729 P.2d 969 (App. 1986). Police officer could properly testify that the defendant possessed the cocaine for sale.

State v. Lamb, 142 Ariz. 463, 690 P.2d 764 (1984). State's criminalist was properly allowed to testify that he saw what appeared to be blood diluted with water.

State v. Roberts, 139 Ariz. 117, 677 P.2d 280 (App. 1983). Trial court should have admitted testimony of psychologist who found victim had a learning disability and fantasized about men hurtng women.

State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983). Detective who had four years experience, had specialized training in homicide and had investigated 20 shooting deaths and 40-50 non-fatal shootings, was qualified to give expert testimony.

State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983). Proper to allow animal control officer to testify as expert that dog whose remains were found in the burned-out home had been poisoned.

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981). A detective's demonstration of firing positions did not require that he witness the actual shooting since the "knowledge upon which his testimony was based related not to the shooting itself but to the positions a person would have to assume to conform to the plotted trajectories." The testimony would assist the jury and "the demonstration was relevant to the issues of premeditation and self-defense."

State v. Passarelli, 130 Ariz. 360, 636, P.2d 138 (App. 1981). Highway Patrolman who had been with the Highway Patrol for 14 years, investigated more than 500 accidents, been trained in accident investigation at the academy, updated his training continually, worked with accident reconstructionists, worked on cars all his life, and was a certified mechanic was qualified to '"render enlightened opinions"' that the accident could not have

happened as defendant claimed it did, even though he had no classroom training in accident reconstructions.

State v. Blevins, 128 Ariz. 64, 623 P.2d 853 (App. 1981). Admission of testimony of motor vehicle accident reconstruction experts "was discretionary with the trial court."

B. OUTSIDE THE JURY'S KNOWLEDGE

State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986). Characteristics of child molest victims are outside the jury's knowledge.

State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983). Expert testimony on reliability of identification should have been admitted in this particular case.

State v. Williams, 132 Ariz. 153, 644 P.2d 889 (1982). "Dr. Froede assisted the trier of fact by explaining the vulnerability of the neck area. The officers' necks were not protected by the gear. The doctor diagrammed the neck area indicating the jugular vein. The information is a matter of special knowledge and is beyond the expertise of most laypersons. Admitting the expert testimony to assist the jury was within the sound discretion of the trial court."

State v. Betancourt, 131 Ariz. 61, 638 P.2d 728 (App. 1981). "While a psychiatrist cannot testify as to whether a state of voluntary intoxication would preclude the formation of the required specific intent, State v. Briggs, 112 Ariz. 379, 542 P.2d 804 (1975), this does not mean that an expert witness cannot testify as to the effects of an intoxicant, generally." Since the intoxicant in this case was LSD which is not "necessarily within the common experience and knowledge of the jury", the trial court erred in precluding the expert testimony.

III. EXPERT TESTIMONY INADMISSIBLE

A. TESTIMONY IRRELEVANT

State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986). Expert opinion testimony regarding credibility of a witness is inadmissible.

State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985). In this particular case, court was correct to suppress expert testimony about eyewitness identification.

State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983). Expert testimony as to whether defendant was acting "reflectively or reflexively," etc. was not admitted.

State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637 (1983). Expert testimony on defendant's state of mind at the time of the crime is generally inadmissible unless the defense is insanity.

State v. Mack, 134 Ariz. 89, 654 P.2d 23 (App. 1982). Trial court correctly rejected expert testimony regarding the reliability of an informant. The informant was not presented as a witness at trial and there was no testimony that in this investigation the police relied upon information from him.

B. "EXPERT" LACKED KNOWLEDGE

State v. Evans, 149 Ariz. 577, 720 P.2d 962 (App. 1986). The former chief of clinical psychology at the U of A could not testify about the defendant's insanity because the chief did not have enough of an opinion to assist the jury.

State v. Mack, 134 Ariz. 89, 654 P.2d 23 (App. 1982). Trial court did not abuse its discretion in precluding expert testimony which would have impeached the testimony of the arresting officer as to his failure to make a

departmental report. "[N]o foundation was presented in appellant's offer of proof indicating that the investigator was familiar with police procedures where Officer Norgaard worked and therefore he failed to show that the witness was competent to given an expert opinion on this precise issue."

State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981). A person "is not an expert simply because he has a source of generally reliable information and customarily acts on it. A person is an expert who can express an opinion when he has skill, experience or knowledge in a particular field."

C. WITHIN THE JURY'S KNOWLEDGE

State v. McKinney, 185 Ariz. 567, 585, 917 P.2d 1214, 1232 (1996). Primary concern in admitting expert testimony is to determine whether subject matter of testimony is beyond common experience of people of ordinary education, so that opinions of experts would assist trier of fact.

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). "[T]he effect of alcohol intoxication is an area within the common knowledge and experience of the jury, and therefore, no expert testimony is needed to assist the trier of fact. *State v. Laffoon*, 125 Ariz. 484, 610 P.2d 1045 (1980); *State v. Means*, 115 Ariz. 502, 566 P.2d 303 (1977). Thus, it is proper for a trial court to preclude psychiatric testimony relating to the effect of alcohol upon the ability to form specific intent. Id."

State v. Hicks, 133 Ariz. 64, 649 P.2d 267 (1982). Since expert testimony would add nothing to the existing evidence that appellant might have had an alcoholic black-out at the time of the shooting (blood alcohol level of . 26%, three to four hours after the shooting, witnesses who saw him drink a lot that day, testimony that he had been an alcoholic for many years] no expert was "needed to establish that appellant may have had an alcoholic black-out on the night of the shooting."

State v. Laffoon, 125 Ariz. 484, 610 P.2d 1045 (1980). "Psychiatric testimony relating to appellant's ability to form specific intent was properly refused" because "the effect of alcohol voluntarily induced is an area within the common knowledge and experience of the jury. . . "

State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980). Trial court did not abuse its discretion in excluding certain testimony of a defense psychiatrist which would have supported defendant's self-defense claim. "The issue whether appellant was thinking reflectively prior to shooting Koester could be resolved by the jury without expert assistance, once it had determined the facts surrounding the shooting."

OTHER JURISDICTIONS

United States v. Robbins, 579 F.2d 1151 (9th Cir. 1978). Qualified expert could testify place and time gun was made.

United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978). Columbia was the source of marijuana.

United States v. Ruffin, 575 F.2d 346 (2nd Cir. 1978). FBI agent qualified to explain real estate documents.

United States v. Barletta, 565 F.2d 985 (8th Cir. 1977). Agent could testify defendant was high ranking member of organization.

United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977). Proper to exclude doctor's testimony about defendant's predisposition, judge heard it without jury, decided it would confuse issues.

United States v. Collins, 559 F.2d 561 (9th Cir. 1977). Defense attorney didn't challenge expert's qualifications, opinion that articles from search same as in bank photos permissible.

United States v. Viglia, 549 F.2d 335 (5th Cir. 1977). Pediatrician was member of obesity committee and was proper expert on prescribing drugs to control obesity.

United States v. Green, 548 F.2d 1261 (6th Cir. 1977). Too much testimony on how bad, dangerous, etc., a drug is constituted reversible error.

United States v. Lopez, 543 F.2d 1156 (5th Cir. 1976). Proper to exclude, after going into lack of qualifications, defendant's expert who would have testified that defendant's assault on prison official was due to sensory deprivation.

United States v. Brown, 540 F.2d 1048 (10th Cir. 1976). Proper refuse defendant's proffered expert testimony about the weakness of eyewitness I.D.

Kaufman v. Edelstein, 539 F.2d 811 (2nd Cir. 1976) *But see United States v. Alvarez*, 519 F.2d 1036 (3rd Cir. 1975). No general privilege for expert not to testify.

United States v. Golden, 532 F.2d 1244 (9th Cir. 1976). Agent's opinion on the market value of seized heroin admissible.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or infrence unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Comment

This rule, along with others in this article, is designed to expedite the reception of expert testimony. Caution is urged in its use. Particular attention is called to the Advisory Committee's Note to the Federal Rules of Evidence which accompanies Federal Rule 703. In addition, it should be emphasized that the standard "if of a type reasonably relied upon by experts in the particular field" is applicable to both sentences of the rule. The question of whether the facts or date are of a type reasonably relied upon by experts is in all instances a question of law to be resolved by the court prior to the admission of the evidence. If the facts or data meet this standard and form the basis of admissible opinion evidence they become admissible under this rule for the limited purpose of disclosing the basis for the opinion unless they should be excluded pursuant to an applicable constitutional provision, statute, rule or decision.

Evidence which is inadmissible except as it may qualify as being "reasonably relied upon by experts in the particular field" has traditionally included such things as certain medical reports and comparable sales in condemnation actions.

Source: Federal Rules of Evidence, Rule 703.

Cross Reference

16 A.R.S. Rules of Civil Procedure, Rule 26(b)(4) and 17 A.R.S. Rules of Criminal Procedure, Rule 15.1(a)(3) and 15.2.

Limited admissibility, Arizona Rules of Evidence, Rule 105.

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Pipher v. Loo, 221 Ariz. 399, 403-04, 212 P.3d 91, 95-96 (App. 2009). The test for admissibility of an expert's opinion based on facts not in evidence is whether the source relied upon by the expert is reliable.

State v. Talmadge, 196 Ariz. 436, 439, 999 P.2d 192, 195 (2000). Opinion of a non-testifying expert may be disclosed to the trier of fact only if it serves as the basis of the opinion of the testifying expert and may not be disclosed merely to prove the truth of the matter asserted.

State v. Baltzell, 175 Ariz. 437, 441, 857 P.2d 1291, 1295 (App. 1992). Photographs of victim's car, with victim still inside, were properly admitted as demonstrating and explaining basis of investigator's opinion that defendant's speed was consistent with prosecution's estimate of 85 to 100 miles per hour and inconsistent with defendant's estimate of 40 to 60 miles per hour.

State v. Hudson, 152 Ariz. 121, 730 P.2d 830 (Ariz. 1986). The court may limit an experts testimony under Rule 705.

State v. Noleen, 142 Ariz. 101, 688 P.2d 993, (1984). The medical examiner did not perform the autopsy but he was entitled to testify about the cause of death based on his reading of the medical-examiner's reports. An expert witness can rely on inadmissible evidence, Rule 703.

State v. Villafuerte, 142 Ariz. 323, 690 P.2d 42 (1984). The court did not err where it allowed a forensic pathologist to testify as to the results of laboratory reports he did not prepare. "The comment to Rule 703 clearly illustrates that evidence of the type involved in this case is within the rule: '[e)vidence which is inadmissible except as it may qualify as being "reasonably relied upon by experts in the particular field" had traditionally included such things as certain medical reports.'

State v. Williams, 132 Ariz. 153, 644 P.2d 889 (1982). "Appellant's final argument that the doctor, not having sat through the trial, should not have given his opinion that the stick was dangerous under the circumstances has no merit. The expert viewed the protective gear and the stick. An expert is permitted to give an opinion, Ariz.R.Evid. 703, even if it involves the ultimate issue in the case. Ariz.R.Evid. 704. The expert testimony was properly admitted."

State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981). "Even if otherwise inadmissible hearsay underlying an expert opinion is introduced into evidence, it has only 'the limited purpose of disclosing the basis for the opinion***.' Comment to Rule 703, Arizona Rules of Evidence. The hearsay underlying the expert opinion has no substantive value. *Hickok v. G. D. Searle & Company*, 496 F.2d 444, 447 (10th Cir. 1974)."

State v. Blevins, 128 Ariz. 64, 623 P.2d 853 (App. 1981). Foundation, which included testimony about damage to the two vehicles, the location of the vehicles after they had come to rest, the location of the victim's body, the debris in the roadway, the size and location of the gouge, skid and scuff marks on the pavement, headlight and taillight filament damage, remnants of a decal from the motorcycle found on the automobile, and a fabric impression from the victim's clothing which was found on the hood of the car, was sufficient for the expert testimony.

State v. Blevins, 128 Ariz. 64, 623 P.2d 853 (App. 1981). "Admission of testimony of accident reconstruction experts was discretionary with trial court."

State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979). The testimony of an expert on the Mexican Mafia in particular and prison gangs in general was admissible even though it was based on hearsay. Even though much of the specific information received by the witness in his interviews with inmates and guards was inadmissible hearsay, "the information relied upon by the expert witness was nevertheless 'of a type [that could be] reasonably relied upon by experts * * in forming opinions or inferences upon the subject * * *.'"

State v. Rupp, 120 Ariz. 490, 586 P.2d 1302 (App. 1978). "Arizona now follows the rule that if supportive factual material is of a type reasonably relied upon by experts in the formation of opinions, the material itself need not be admitted into evidence."

OTHER JURISDICTIONS

United States v. Genser, 582 F.2d 292 (3rd Cir. 1978). Opinion of expert about audit, based on hearsay, admissible, not admitting audit papers did not deny confrontation.

United States v. Shields, 573 F.2d 18 (10th Cir. 1978). No objection, proper to give opinion on handwriting, even though documents compared weren't originals and were not admitted into evidence.

United States v. Hollman, 541 F.2d 196 (8th Cir. 1976). State chemist's reliance on known sample of heroin proper since experts normally relied on known samples.

United States v. Golden, 532 F.2d 1244 (9th Cir. 1976). Special agent's opinion of the value of drug not inadmissible because part of its base was hearsay from agents in other parts of the world.

United States v. Morrison, 531 F.2d 1089 (1st Cir. 1976). Gambling expert's testimony proper despite hearsay base, where expert checked work relied on.

United States v. Smith, 519 F.2d 516 (9th Cir. 1975). In some opinion matters an expert must rely on inadmissible information.

United States v. Simms, 514 F.2d 147 (1975). Proper to allow psychiatric expert to rely in part on agent's statements about defendant. Further, Rule 703 merely codifies already existing law.

RULE 704. OPINION ON ULTIMATE ISSUE.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Comment

Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases.

Source: Federal Rules of Evidence, Rule 704.

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Webb v. Omni Block, Inc., 216 Ariz. 349, 353, 166 P.3d 140, 144 (App. 2007). Opinion testimony by an expert witness that encompasses an ultimate issue is generally admissible when it alludes to an inference that the trier of fact should make, or uses a term that has both a lay factual meaning and legal meaning, and it is clear that the witness is using only the factual term.

Souza v. Fred Carries Contracts, Inc., 191 Ariz. 247, 254, 955 P.3d 3, 10 (App. 1997). Generally, when qualified expert testifies that defendant's negligence or product defect caused or contributed to

accident and resulting injury, that evidence is sufficient to prevent summary judgment and warrant trial.

Dunham v. Pima County, 161 Ariz. 304, 307, 778 P.2d 1200, 1203 (1989). Traffic and highway safety engineering expert could give opinion regarding dangerousness of intersection, even if opinion involved issue jury would be asked to decide in action against county to recover for injuries sustained in collision at intersection.

Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983). The Arizona Supreme Court upholds the constitutionality of A.R.S. § 28-692(B), the prohibition against driving with .10 percent or more blood alcohol, against various constitutional attacks. Defendant's behavior at the arrest is relevant. The case goes on to say that officers should not give their opinion that defendant was drunk at the time of the arrest, Rules 704 and 403, and holds that a certificate attached after the appeal had been filed is insufficient proof of compliance with (R9-14-41 5) (A) and (B). Compliance with foundation requirements may be established by documentary evidence admitted under Rules 803(6) and (8) 90I(D), 902 and 1005

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983). Testimony by medical examiner regarding whether victim died of a homicide or an accident was properly admitted.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). "While Rule of Evidence 704 now provides that 'otherwise admissible evidence' is not objectionable simply because it 'embraces' the ultimate issue, the comment to the rule sets forth the reason for the general inadmissibility of testimony tending to establish the opinion of the witness as to the defendant's guilt or innocence, truthfulness or untruthfulness."

State v. Williams, 132 Ariz. 153, 644 P.2d 889 (1982). Even though the question of whether the stick was a dangerous instrument was the precise question the jury had to determine to render a verdict under A.R.S. § 13-1206, the expert's testimony on the subject was properly admitted.

State v. Blevins, 128 Ariz. 64, 623 P.2d 853 (App. 1981). The trial court did not err when it allowed a deputy sheriff to testify that, as a result of three to four hundred hours spent reconstructing the accident, it was his conclusion that the defendant had been following the motorcycle too closely before the collision.

State v. Gentry, 123 Ariz. 135, 598 P.2d 113 (App. 1979). It was not error for the trial court to allow an expert "to give the conclusions he drew from the circumstances of the accident, even though one of his conclusions was that appellant was driving, an ultimate issue for the jury's determination."

State v. Keener, 110 Ariz. 462, 520 P.2d 510 (1974). Properly qualified police officer allowed to testify as expert on whether drugs for sale, the ultimate issue. Police have also qualified as experts on a variety of drug related topics, see *inter alia*, *State v. Mosely*, 119 Ariz. 393, 581 P.2d 238 (1978); *State v. Prevost*, 118 Ariz. 110, 574 F.2d 1319 (1978). Officer expert though never seen heroin snorted.

OTHER JURISDICTIONS

United States v. Masson, 582 F.2d 961 (5th Cir. 1978). Expert was allowed to testify defendant was worker, not mere player.

United States v. Sellers, 566 F.2d 884 (4th Cir. 1977). Defendant was person in bank surveillance photos.

United States v. Barletta, 565 F.2d 985 (8th Cir., 1977). Defendant was high ranking member of organization.

United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977). State shrinks expressed opinion on duress and voluntary participation in crime.

United States v. Taylor, 562 F.2d 1345 (2nd Cir. 1977). Seeking opinion on ultimate issue proper.

United States v. Smith, 550 F.2d 277 (5th Cir. 1977). Proper for employee to testify boss knew of the law boss violated.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Source: Federal Rules of Evidence, Rule 705.

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State v. Bible, 175 Ariz. 549, 581, 858 P.2d 1152, 1184 (1993). It was not error to have foundational showing for admission of DNA testimony made before the jury where the state made a proper foundational showing, laboratory personnel had adequate qualifications, test used was that described by the appropriate testing protocol, and the results were properly recorded.

Lynn v. Helitec Corp., 144 Ariz. 564, 568, 698 P.2d 1283, 1287 (App. 1984). Facts or data, not admitted or inadmissible, upon which expert may reasonably rely may be revealed to trier of fact not as substantive evidence but to show basis of expert's opinion.

Purcell v. Zimmerman, 18 Ariz.App. 75, 90, 500 P.2d 335, 350 (1972). An expert witness may be cross-examined as to whether he admits other books are recognized as standard authority and, upon such admission, may be confronted with statements in those books.

OTHER JURISDICTIONS

United States v. Mangan, 575 F.2d 32 (2nd Cir. 1978). Defense attorney not denied effective cross-examination, had photos of disputed prints for two weeks, could have called our experts.

United States v. Santarpiro, 560 F.2d 448 (1st Cir. 1977). Court could credit expert's opinion, defense attorney failed to question relevancy of factors opinion was based on.

RULE 706. COURT APPOINTED EXPERTS

(a) *Appointment.* Appointment of experts by the court is subject to the availability of funds or the agreement of the parties concerning compensation. The court may, on its own motion or on the motion of any party, enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witenss shall not be appointed by the court unless the witness consents to the act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; the witness' deposition may be taken by any party, and the witness may be

called to testify by the court or any party. The witness shall be subject to cross- examination by each party, including a party calling the witness.

(b) *Disclosure of appointment*. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(C) *Parties' experts of own selection*. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Comment

Federal Rules of Evidence, Rule 706(b) is appropriate in Federal Courts where the funds to compensate experts are made available by statute. Such funds are not generally available in Arizona except in capital offenses, A.R.S. § 13-673; sanity hearings, A.R.S. § 13-1674; medical liability review panels, A.R.S. § 12-567(B)(4) and (M); and mental health proceedings,

A.R.S. S 36-545.04. Therefore, Arizona Rule of Evidence 706(a) was prefaced by the availability of these funds or the compensation of the experts to be agreed upon, and Federal Rules of Evidence, Rule 706(b) was not adopted, and paragraphs numbered (c) and (d) were renumbered paragraphs (b) and (c) respectively.

Source: Federal Rules of Evidence, Rule 706, (modified.)

Cross Reference

17 A.R.S. Rules of Criminal Procedure, Rules 11.3 and 11.4.

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State v. Schackart, 175 Ariz. 494, 499-500, 858 P.2d 639, 644-645 (1993). Appointment of psychiatrist by court to examine defendant who planned to call same psychiatrist to testify regarding his mental state at time of killing did not violate rule of evidence prohibiting court from appointing expert unless witness consents to act, where nothing, other than defense counsel's representations to trial court, indicated that doctor refused to accept court appointment, and to contrary, record reflected that, following trial, doctor reexamined defendant, in preparation for aggravation/mitigation hearing, where he again was expert witness for defense.

State v. Chaney, 141 Ariz. 295, 308, 686 P.2d 1265, 1278 (1984). Whether an expert witness is to be appointed for criminal defendant is within discretion of trial judge.

State v. Chaney, 141 Ariz. 295, 686 P.2d 1265 (1984). The trial court acted correctly under Rule 706(a) when it refused to appoint a defense expert to examine defendant for temporal lobe epilepsy. The doctors who examined defendant pursuant to Rule 11 said that defendant did not have temporal lobe epilepsy because they did not find the external symptoms associated with the disease.

OTHER JURISDICTIONS

United States v. Green, 544 F.2d 138 (3rd Cir. 1976). Judge can appoint own expert and rely on him to find defendant competent. Judge could also have law clerks observe defendant away from experts to determine if the symptoms were genuine.

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. 'Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if --

(1) Prior statement by witness . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, or (b) consistent with the declarant's testimony and is offered to rebut an expressed or implied charge against the declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person adthorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Comment

Evidence which is admissible under the hearsay rules may be inadmissible under some other rule or principle. A notable example is the confrontation clause of the Constitution as applied to criminal cases. The definition of "hearsay" is a utilitarian one. The exceptions to the hearsay rule are based upon considerations of reliability, need, and experience. Like all other rules which favor the admission of evidence, the exceptions to the hearsay rule are counterbalanced by Rules 102 and 403. Rule 801(d). This subsection of the rule has been modified and is consistent with the United States Supreme Court's version of the Rule and *State v. Skinner,* 110 Ariz. 135, 515 P.2d 880 (1973).

Source: Federal Rules of Evidence, Rule 801, (modified).

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I STATEMENT

A. NONVERBAL CONDUCT INTENDED AS AN ASSERTION

State v. Crivellone, 138 Ariz. 437, 675 P.2d 697 (1983). The police officer was allowed to testify that he went to the dying victim of the robbery and asked him questions. He also was allowed to testify about the victim's conduct by which the victim answered the questions. While the victim's assertive conduct was hearsay under

Rule 801(A), the statements were admissible under Rule 803(2) as excited utterances.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). "Janes' demonstration on the diagram of Sipler's out-of-court gesture indicating the points at which the defendant had admitted striking Penny with the knife was simply a repetition of Sipler's 'non-verbal conduct ... intended by [her] as an assertion' of what defendant had told her. Evidence Rule 801 (A)(2). That gesture was, therefore, a 'statement.' [footnote omitted]"

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982). "The station manager's testimony about Chevron back-billing him was ... hearsay. The back-billing act by Chevron was nonverbal conduct intended as an assertion of unauthorized signatures, not made during trial, and offered to prove the truth of the matter asserted therein."

B. NONVERBAL CONDUCT NOT INTENDED AS AN ASSERTION

State v. Ellison, 213 Ariz. 116, 132, 140 P.3d 899, 915 (2006). Detective's testimony about codefendant's body language and actions during interrogation when codefendant discussed defendant was not hearsay, and thus was admissible in capital murder trial; nonverbal conduct by codefendant was not in response to police questioning about his feelings regarding defendant, and defendant did not offer any other specific evidence or circumstances indicating codefendant intended his conduct to assert his fear of defendant.

State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (App. 1980). An officer was properly allowed to testify as to his opinion about the victim's mental condition, responsiveness, and competence after the assault. "The fact that the officer's opinion was based on observations of the victim's conduct is of no moment since the conduct was not intended as an assertion."

State v. Printz, 125 Ariz. 300, 609 P.2d 570 (1980). Testimony by an officer in a trial resulting from a sting operation that he bought the television used in Count III for $299.85 before it was sold to defendant as stolen property was properly admitted. "[T]he payment of money by the officer cannot be said to be intended by him at the time it was done as an assertion regarding the value of the television and we therefore find no error."

II. HEARSAY

State v. Bass, 198 Ariz. 571, 577, 12 P.3d 796, 802 (2000). Bystanders' out-of-court utterances about motorist, offered by state, in prosecution of motorist for manslaughter and other offenses, to prove the truth of the allegation that motorist had driven recklessly, were "hearsay."

State v. Valencia, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996). Generally, out of court statements offered in evidence to prove truth of matters asserted in statements are inadmissible.

State v. Bowling, 151 Ariz. 230, 726 P.2d 1099 (App. 1986). Hearsay is admissible before the grand jury.

State v. Via, 146 Ariz. 108, 704 P.2d 238 (1985). Trial court did not error when it admitted a note the victim had written describing where he was going, why, and whom he was meeting. The statement was hearsay under Rule 801(c), however, Rule 802 does not bar it because it was properly admitted under Rule 803(3). The evidence was relevant and admissible to show that the "declarant acted in accordance with his stated intention to be at a certain place at a certain time."

State v. Rivera, 139 Ariz. 409, 678 P.2d 1373 (1984). Reversible error to admit a statement made by the child molest victim to her mother the morning after the crime. But see A.R.S. § 13-1416.

State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209 (App. 1984). Investigator should not have been allowed to testify that rape victim got a towel linked to defendant from the rape scene, victim unavailable to testify.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). "The tapes contained statements made by Ms.

Sipler. These statements were not made in court and were offered to prove the truth of the matter asserted, i.e., that the defendant had told Ms. Sipler that he committed the murder and had provided her with a detailed description of how the murder was accomplished. As such, the contents of the tapes are clearly hearsay. See Rule 80 1(c), ... Therefore, these statements were not admissible and it was error to admit them over objection."

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). Janes' demonstration on the diagram of Sipler's outof-court gesture indicating the points at which the defendant had admitted striking Penny with the knife was simply a repetition of Sipler's 'non-verbal conduct ... intended by [her] as an assertion' of what defendant had told her. Evidence Rule 801 (A)(2). That gesture was, therefore, a 'statement.' [footnote omitted] Thus, evidence of Ms. Sipler's non-verbal conduct which was admitted to prove the truth of the matter asserted was inadmissible hearsay and Janes' repetition of it in court did not transform it into non-hearsay."

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982). "Howard's statement to the station manager that Howard had not authorized the use of his signature was clearly hearsay. The statement was an oral assertion by Howard not made at the trial but which was offered to prove the truth of the matter asserted therein - i.e., that Howard had not authorized his signature."

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982). "The station manager's testimony about Chevron back-billing him was ... hearsay. The back-billing act by Chevron was nonverbal conduct intended as an assertion of unauthorized signatures, not made during the trial, and offered to prove the truth of the matter asserted therein."

State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981). Detective's testimony that the victim was not a member of organized crime was based on conversations with other officers and an N.C.I.C. check was inadmissible hearsay.

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). Trial court erred in allowing testimony relating to statements made by the murder victim that she feared defendant, that he had threatened her, and that he was "capable of anything." "The statements are patently hearsay since they were offered to prove the truth of the matters asserted ...."

State v. McVay, 127 Ariz. 450, 622 P.2d 9 (1980). In effect, the testimony of the detective was a statement as to what authorities in Pima County and California told him about defendant's conduct after the murder. Those authorities were not available for cross-examination, so the "effect of Detective Klettinger's testimony was to bring these same hearsay statements into evidence in the form of Detective Klettinger's opinion. As such, Detective Klettinger's opinion was subject to the hearsay objection and was erroneously admitted."

B. OFFERED TO PROVE TRUTH BUT HARMLESS ERROR

State v. Petzoldt, 172 Ariz. 272, 277, 836 P.2d 982, 987 (App. 1991). Admission of hearsay evidence linking defendant to house to which marijuana was delivered was harmless error, in light of overwhelming amount of other evidence identifying defendant as the person involved in drug trafficking activities and linking him to that house.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). Excerpt from witness' diary which detailed defendant's "confession" to the witness was inadmissible hearsay. Admission was harmless error, though, because the diary statement did not differ in any significant way from the witness' preliminary hearing testimony and the defendant's testimony substantially corroborated similar admissible testimony.

C. OFFERED TO PROVE TRUTH BUT WAIVED

State v. Washington, 132 Ariz. 429, 646 P.2d 314 (App. 1982). "Appellant correctly contends on appeal that the bait bill receipt constituted a hearsay statement. The declarant-author of the receipt was not called and did not testify, yet the receipt was offered in evidence to prove the truth of the matter asserted; namely, that a certain dollar bill found at the place of appellant's arrest was in the cash drawer at the time of the robbery." However,

defendant did not object on hearsay grounds so the error was waived.

D. NOT OFFERED TO PROVE TRUTH

1. EXPLAIN POLICE INVOLVEMENT

State v. Silva, 137 Ariz. 339, 670 P.2d 737 (App. 1983). Tape recording of drug dealings were "admitted with no other testimony than the foundation of another officer who identified the voices and described the recording devices;" it was not offered for the truth of the matter, no hearsay.

State v. Bruni, 129 Ariz. 312, 630 P.2d 1044 (1981). Permitting an officer to testify that a check on a license number similar to one given by a victim gave them a name and address which led them to the defendant was not error. "This was not hearsay since it was not offered to prove the truth of the matters asserted. It informed the jury how appellant and his automobile were located."

State v. Flores, 124 Ariz. 310, 603 P.2d 937 (App. 1979). Even if the narcotics agent's testimony that he was at defendant's home because he had been buying drugs indirectly from him through an informant was a statement, "it was not hearsay. It was not offered to prove the truth of the matter asserted. Rather, it was admissible to show the reason for the officer's presence at appellant's residence."

2. STATE OF MIND

State v. Machado, 224 Ariz. 343, ---, 230 P.3d 1158, 1178 (App. 2010). Murder defendant's mistaken identification of vehicle in which victim was driving was not hearsay, as statement was not offered for the truth of the matter asserted but rather to show defendant's knowledge, or lack thereof, of the actual incident.

State v. Tucker, 215 Ariz. 298, 313, 160 P.3d 177, 192 (2007). Written descriptions on the photographs discovered on capital murder defendant's wall did not constitute inadmissible hearsay, where the photographs and their commentary were not introduced during aggravating phase to prove the truth of their contents, but rather to show what defendant displayed on his bedroom wall.

State v. Rivers, 190 Ariz. 56, 60, 945 P.2d 367, 371 (App. 1997). Words offered to prove their effect on hearer are not hearsay and are admissible when they are offered to show their effect on one whose conduct is at issue.

State v. Corrales, 138 Ariz. 583, 676 P. 2d 615 (1983). A cellmate was allowed to testify about defendant's desire to kill an accomplice because he implicated defendant. It was not hearsay because it was not given for the truth of a matter.

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (Ariz. 1983) cert. denied 104 S.Ct. 199. It is not hearsay where statement was not offered for the truth of the matter but rather to show that witness remembered the day of the crime.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). A separate diary entry was admissible and not hearsay. This "diary entry was not offered to prove the truth of the matters asserted - that the defendant killed Penney, that Rita feared him, that he might kill her, that he was provoked and shouldn't go to jail, etc. - but to show inferentially that Ms. Sipler believed that the defendant killed Penny. Declarations offered as circumstantial evidence of the declarant's state of mind are not hearsay at all because they are not offered to prove the truth of the declaration."

State v. O'Brien, 123 Ariz. 578, 601 P.2d 341 (App. 1979). A witness' testimony regarding promises made

to him when he bought a lot was not offered to prove the truth of the matter asserted, "but to explain the purchaser's state of mind when he paid the inflated price reflected by the mortgages."

III. STATEMENTS WHICH ARE NOT HEARSAY

A. PRIOR STATEMENTS BY WITNESS

1. INCONSISTENT

State v. Sucharew, 205 Ariz. 16, 23, 66 P.3d 59, 66 (App. 2003). The probative value of prior inconsistent statement to police officer by witness, who was allegedly racing defendant, regarding how fast witness's car was going when defendant's car was involved in fatal accident outweighed any prejudicial effect to defendant, and thus, statement to officer was admissible for impeachment purposes, where witness acknowledged discussing his driving speed with officer, officer did not have an interest in the outcome of the trial, and impeachment testimony offered by officer was not the sole evidence of defendant's guilt.

State v. Miller, 187 Ariz. 254, 257-58, 928 P.2d 678, 681-82 (App. 1996). In determining whether to allow admission of prior inconsistent statement, factors to be considered include: witness being impeached denies making the impeaching statement, and witness presenting impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or there are other factors affecting reliability of impeaching witness, such as age or mental capacity, true purpose of the offer is substantive use of statement rather than impeachment of witness, and impeachment testimony is the only evidence of guilt; factors are not exhaustive and are analyzed on case-by-case basis.

State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986). The trial court properly admitted the child molest victim's prior inconsistent statements as substantive evidence under Rule 801 (d)(1)(A).

State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984). Defendant's letters to her husband were properly excluded because the witness did not testify and the statement could not be admitted as prior consistent statements under Rule 801(d)(1)(A).

State v. Woods, 141 Ariz. 446, 687 P.2d 1201 (1984). The court should allow ordinarily inadmissible evidence if the evidence has substantive use, Rule 801(d) and will assist the jury in deciding which statement is correct.

State v. Allred, 134 Ariz. 274, 655 P.2d 1326 (1982). Notwithstanding *State v. Cruz*, 128 Ariz. 538, 627 P.2d 689 (1981), impeachment testimony may be used substantively to convict even if the out-of-court statements establish the defendant's guilt. However, Rules 102 and 403 may still necessitate inadmissibility of the impeaching statements which otherwise would have been admissible under Rule 801 (d)(1)(A).

"Our principal concern must focus on the danger of unfair prejudice when the impeaching testimony is used for substantive purposes. The following circumstances are among the factors to be considered:

a. the witness being impeached denies making the impeaching statement, and

b. the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or

c. there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity, ...

d. the true purpose of the offer is substantive use of the statement rather than impeachment of the witness,

e. the impeachment testimony is the only evidence of guilt. The foregoing

circumstances are not the only indicia of unfair prejudice which may arise in future cases ...."

State v. Druke, 132 Ariz. 126, 644 P.2d 280 (App. 1982). Trial court erred when it precluded the state's inquiry as to the witness' prior statements which would have both impeached his testimony and tended to show defendant's guilt. "The facts of the instant case are clearly distinguishable from those in *Cruz*. The only similarity is that Joey's prior statements tend to prove Darrell's guilt. However, unlike *Cruz*, the reliability of the prior statements does not require resolution of a swearing contest between Joey and the person to whom the statements were made. Joey admitted having made the statements and thus it was for the trier of fact to decide which version of the events, as related by Joey, was true."

State v. Navallez, 131 Ariz. 172, 639 P.2d 362 (App. 1981). "[I]n order for a prior statement to be admitted for impeachment it must directly, substantially, and materially contradict testimony in issue."

State v. Hines, 130 Ariz. 68, 633 P.2d 1384 (1981). "A prior omission will constitute an inconsistency only where it was made under circumstances rendering it incumbent upon the, witness to, or be likely to, state such a fact." The test stated in *Wigmore* is cited with approval: "would it have been natural for the person to make the assertion in question?"

State v. Cruz, 128 Ariz. 538, 627 P.2d 689 (1981). Arizona Rule 801 (d)(1)(A) is much less restrictive than its federal counterpart in that it does not require "that the prior inconsistent statement must have been given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

State v. Cruz, 128 Ariz. 538, 627 P.2d 689 (1981). In this case, the statement did more than merely impeach the witness' statement; it also related directly to the guilt of the defendant and should not have been admitted. "As noted in the comment to 17A A.R.S. Rules of Evidence, Rule 801, [1]ike all other rules which favor the admission of evidence, the exceptions to the hearsay rule are counterbalanced by Rules 102 and 403."'

State v. Acree, 121 Ariz. 94, 588 P.2d 836 (1978). Rule 801(d) codifies the holding of *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973), which held that "prior inconsistent statement, when properly admitted, may be used for substantive as well as for impeachment purposes."

2 CONSISTENT

State v. Jones, 197 Ariz. 290, 300, 4 P.3d 345, 355 (2000). Declarant's statement to police that defendant had admitted needing to leave town because he had killed some people was admissible in capital murder case under the hearsay exception for prior consistent statements, as declarant was not offered a deal to testify until later, and thus, had no motive to fabricate the original statement.

State v. Reinhardt, 190 Ariz. 579, 587, 951 P.2d 454, 462 (1997). Prior consistent statement properly admitted under Rule 801(d)(1)(B), governing statements admissible to rebut a charge of recent fabrication or improper influence, is by definition relevant under Rule 401.

State v. Martin, 135 Ariz. 552, 663 P.2d 236 (1983). "[T]o be admissible, the witness must make the prior consistent statement before the existence of facts that indicate a bias arises."

State v. Conroy, 131 Ariz. 528, 642 P.2d 873 (App. 1982). "Additionally, the statements were not hearsay because they were offered to rebut an express or implied charge of fabrication. In this case, appellant attacked the credibility of the victim in his opening statement, cross-examined her with her prior denials at the preliminary hearing, and attempted to show that Loomis and the Steeles had influenced the victim to testify the way she did.

Under these circumstances, the statements were admissible under Rule 801(d)(1)(B)."

State v. Williams, 131 Ariz. 211, 639 P.2d 1036 (1982). "Appellant argues the trial court erroneously allowed the officer to relate to the jury the victim's statements which were consistent with her testimony at trial. We do not agree. By Ariz.R.Evid. 801 (d)(1)(B) [footnote omitted], the victim's statements were admissible because they were consistent with her testimony at the trial. They were offered to rebut an express and implied charge against her of improper motive - that she had consented to the sexual intercourse, later felt shame, and concocted the accusation of rape."

State v. Grier, 129 Ariz. 279, 630 P.2d 575 (App. 1981). "The composite and the victim's statements that led to its creation were also admissible under Rule 801(d)(1)(B) as prior consistent statements offered to rebut a charge of recent fabrication."

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). Questioning the murder victim's daughter about counseling she had received to help her deal with the death went beyond rebutting a possible inference of fabrication raised on cross-examination and admission of the testimony was a clear abuse of discretion.

State v. Spratt, 126 Ariz. 184, 613 P.2d 848 (App. 1980). Trial court properly refused to allow a witness to testify on surrebuttal that at a prior time the defendant had told her he was innocent "since there was no express or implied charge against appellant of recent fabrication or improper influence or motive

3. IDENTIFICATION

State v. Reinhardt, 190 Ariz. 579, 5 87-88, 951 P.2d 454, 462-63 (1997). Circumstantial evidence was sufficient to identify defendant as person who called and spoke to witness by telephone, though defendant did not identify himself during telephone conversation, and thus Defendant's statements were admissible as admissions of party opponent; caller wanted his money back and witness' boyfriend had defendant's money, and caller's statement to witness that caller would take victim "for a hike" and kill victim if boyfriend did not return caller's money, was same as defendant's statement to boyfriend.

State v. Romanosky, 162 Ariz. 217, 226, 782 P.2d 693, 702 (1989). Admission of police officer's testimony regarding photo lineup shown to murder victim's wife, which resulted in wife narrowing five photos down to two, did not amount to fundamental error despite defendant's contention that testimony was inadmissible under hearsay exception because no in-court identification was made and because wife did not describe lineup.

State v. Grier, 129 Ariz. 279, 630 P.2d 575 (App. 1981). A composite was not inadmissible hearsay - "By initially directing the construction of the composite and identifying the completed composite as closely resembling her assailant, the victim made assertions regarding the identity and description of her assailant. Those assertions were admissible as an identification of her assailant under 'Part (C)'."

E. ADMISSIONS BY PARTY-OPPONENT

1. OWN STATEMENT

Salt River Project Agricultural Improvement and Power Dist. v. Miller Park, LLC, 218 Ariz. 246, 249, 183 P.3d 497, 500 (2008). Property owner's own valuation of property for tax purposes may be admissible in non-tax contexts as a party admission.

Randall v. Alvarado-Wells, 187 Ariz. 308, 309, 928 P.2d 732, 733 (App. 1996). Alleged statements by motorist at accident scene that she was at fault for collision that resulted when motorcycle rider

behind her changed lanes and struck passenger side of another vehicle were admissions by a party, and therefore not hearsay, in motorcycle rider's negligence action against motorist.

State v. Atwood, 171 Ariz. 576, 619, 832 P.2d 593, 636 (1992). Defendant's statements to Federal Bureau of Investigation (FBI) agents concerning his activities on day of murder victim's disappearance were "admissions" and were not hearsay, although statements were neither exculpatory nor inculpatory.

State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983), abrogated on other grounds by *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989). Defendant's statement that "he didn't snitch on himself" was properly admitted by a party-opponent and was not hearsay.

State v. Spoon, 137 Ariz. 105, 669 P.2d 83 (1983). Testimony from jail mates was admitted for purpose of introducing defendant's own statements against him, thus, no hearsay.

State v. Gerlaugh, 134 Ariz. 164, 654 P.2d 800 (1982). "Here, the statement of Encinas [a codefendant in the joint trial] was his own statement and it was offered against him. It is not hearsay. The court did not err in denying appellant's objection."

State ex rel. Hyder v. Superior Court, 128 Ariz. 253, 625 P.2d 316 (1981). "If the letters contain incriminating information, they would be relevant and could be admitted under Rule 801(d)(2), Arizona Rules of Evidence, 17A A.R.S., as admissions by party-opponent. They would be admissible, however, only if there were proof that the letters were written by Wayman [the defendant]."

State v. Tudgay, 128 Ariz. 1, 623 P.2d 360 (1981). Deposition given by defendant in a civil suit prior to the filing of criminal charges was properly admitted. There is no requirement that there be "a showing that the deponent was instructed regarding his rights and consciously waived his rights at the civil deposition."

2. ADOPTED STATEMENT

State v. Anderson, 210 Ariz. 327, 339, 111 P.3d 369, 381 (2005). Adoption of a statement occurs when a defendant affirmatively agrees to statements made in his presence, or expounds on the statements by adding his or her own explanations and comments.

State v. Daugherty, 173 Ariz. 548, 550, 845 P.2d 474, 476 (App. 1992). Defendant, by her active participation in conversation with undercover officer at bar, adopted statements of her companion, where defendant expressly agreed with many of statements made by companion and many times expounded on statements by adding her own explanations and comments.

State v. Weigel, 145 Ariz. 480, 702 P.2d 709 (App. 1985). Defendant's statement of "Yes, I know," in response to police officer's statements about the crime was admitted as adoptive admission under Rule 801 (d)(2)(B).

State v. Frustino, 142 Ariz. 288, 689 P.2d 547 (App. 1984). Testimony that a third party threatened victim and ripped her screen door off the hinge after defendant told victim that someone would be over to collect the debt was admissible either as a statement authorized by a party-opponent, Rule 801(b)(2)(C) or a statement by an agent, Rule 801(d)(2)(D).

State v. Miller, 135 Ariz. 8, 658 P.2d 808 (App. 1982). "Although the statement was prejudicial because it showed that the defendant originally did not tell the officers the truth, the defendant did adopt the statement as his own by reviewing it for accuracy and initialing it. We find no error in the admission of Detective Coppock's notes."

3. COCONSPIRATOR'S STATEMENT

State v. Montano, 204 Ariz. 413, 426, 65 P.3d 61, 74 (2003). Statements of a coconspirator will be

admitted when it has been shown that a conspiracy exists and the defendant and the declarant are parties to the conspiracy.

State v. White, 168 Ariz. 500, 504-05, 815 P.2d 869, 873-74 (1991), abrogated on other grounds by *State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992). Defendant was not entitled to instruction under which jury would have determined ultimate admissibility of coconspirator statements; issue of admissibility was within sole province of trial court, and jury was to determine only weight and credibility of coconspirator's statements.

State v. Lawson, 144 Ariz. 547, 698 P.2d 1266 (1985). Woman's testimony about how codefendant beat her was admissible under 801 (d)(2) - it wasn't relevant under Rule 401 but did not have any devastating consequences.

State v. Martin, 139 Ariz. 466, 679 P.2d 489 (1984). Confrontation clause will not ordinarily prevent the introduction of a coconspirator's statements. No abuse of discretion where trial court admitted statements of a coconspirator unless there were two small conspiracies instead of one big one. No abuse in allowing the statement prior to proof of the conspiracy. Instruction may not have been expressed well but it did inform the jury that the statement was conditionally admitted based on the jury finding that the conspiracy existed.

State v. Snowden, 138 Ariz. 402, 675 P.2d 289 (App. 1984). Coconspirator said "come on in, partner" while victim was lying face down on the floor, this was admissible because it was made by a coconspirator during the course of the crime. Statement admitted "even assuming arguendo that nonavailability of the declarant (Kemp) was not shown."

State v. Niqhtwine, 137 Ariz. 499, 671 P.2d 1289 (App. 1983). Taped conversations of conspirators admitted as their statements made in furtherance of a conspiracy." Not- withstanding claim that conspiracy ended with delivery of cocaine, intercepted phone calls the day after delivery were admitted because they referred to the object (cocaine) of the conspiracy.

State v. Silva, 137 Ariz. 339, 670 P.2d 737 (App. 1983). Tape-recording of drug negotiations between undercover agents and conspirators was admissible under 801(d)(2)(E).

State v. Politte, 136 Ariz. 117, 664 P.2d 661 (App. 1982). "There is no 'unavailability' requirement in the rule and we find none in those decisions which permit a co-conspirator's statements. [Cites omitted.] The principle upon which the admission of such statements rests is that a conspirator is not only liable for the acts of a co-conspirator but is likewise bound by the declarations of the co-conspirator."

State v. Politte, 136 Ariz. 117, 664 P.2d 661 (App. 1982). "The evidence fell within the firmly rooted evidentiary rule allowing a co-conspirator's statements, *see Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 567 (1980), and reliability can be inferred. The appellant's arguments on this issue go to the weight rather than the admissibility of the evidence, as, for example, that the declarant would have a motive for lying."

State v. Lycett, 133 Ariz. 185, 650 P.2d 487 (App. 1982). For statements which constitute extrajudicial statements by co-conspirators to be admissible "the record must reveal 'sufficient reliable evidence of a conspiracy"' The standard is not preponderance of the evidence and "the trial court may vary the order of proof and admit the declarations of co-conspirators subject to the subsequent production of the independent proof of the conspiracy."

State v. Viertel, 130 Ariz. 364, 636 P.2d 142 (App. 1981). "Declarations of co-conspirators made in furtherance of the conspiracy and while the conspiracy is continuing are admissible, provided the existence of the conspiracy is proved independently." In this case the unlawful agreement could be inferred from defendant's conduct.

State v. Clovis, 127 Ariz. 75, 618 P.2d 425 (App. 1980). Trial court erred in admitting the confession of the absent codefendant in a joint trial. The confession was inadmissible hearsay as to this defendant.

State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980). Testimony that a codefendant said that the car they were riding in had been stolen from two people who had gone to Hawaii "was admissible as an extrajudicial comment of a co-conspirator made in the course and furtherance of the conspiracy."

State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980). "Statements of a coconspirator will be admitted when it has been shown that a conspiracy exists and the defendant and the declarant are parties to the conspiracy. *State v. Sullivan*, 68 Ariz. 81, 200 P.2d 346 (1948). It is not necessary that a conspiracy be charged, *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973), as long as the record reveals sufficient reliable evidence of a conspiracy to support the admission of the statements of the coconspirator."

State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (App. 1979). Trial court did not err in permitting hearsay statements of the alleged co-conspirators and not allowing hearsay statements by defendant's witnesses. "The hearsay statements which appellant sought to introduce through his witnesses were statements which appellant made to these witnesses approximately one year after Combined Equity was closed and approximately one year after termination of the conspiracy charged in the indictment. On the other hand, the permitted hearsay statements of co-conspirators who testified against appellant concerned statements made during the pendency and in furtherance of the alleged conspiracy." [Emphasis in original.]

State v. Darby, 123 Ariz. 368, 599 P.2d 821 (App. 1979). "Under such circumstances (where the conspiracy was clearly defeated and had come to an end] a statement made to the police by a conspirator, whether inculpatory or exculpatory as to the declarant, which incriminates the other conspirator as a party to the crime, constitutes a termination of the conspiracy and is not made during the pendency of the criminal project."

OTHER JURISDICTIONS

California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970). Proper to admit out of court declaration as substantive evidence if the declarant is present and subject to cross-examination.

United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978). Comparison photos of clothing, inference they were same as bank surveillance photo did not make photos assertions and therefore hearsay.

United States v. Moskowitz, 581 F.2d 14 (2nd Cir. 1978). Composite sketch was not a "statement."

United States v. Lopez, 584 F.2d 1175 (2nd Cir. 1978). Taped conversation of coconspirator and defendant admissible though made after arrest/seizure, was offered merely to prove they knew each other.

United States v. Williams, 577 F.2d 188 (2nd Cir. 1978). Undecided whether post-conspiracy statements fit here, they did under Rule 801 (d)(2)(B).

United States v. Wellendorf, 574 F.2d 1289 (5th Cir. 1978). Exclusion of defendant's testimony about advice at meeting as hearsay was harmless error.

United States v. Krohn, 573 F.2d 1382 (10th Cir. 1978). Not hearsay, government sought to prove making of statements.

United States v. Evans, 572 F.2d 455 (5th Cir. 1978). Computer printouts were not hearsay because of detailed testimony.

United States v. Thomas, 571 F.2d 285 (5th Cir. 1978). Defendant's statement at preliminary tearing to exculpate codefendant admissible to show guilty knowledge.

United States v. Cline, 570 F.2d 731 (8th Cir. 1978). Conversation with homicide victim offered to show ill feelings, not truth of conversation.

United States v. Hodges, 566 F.2d 674 (9th Cir. 1977). Statements not hearsay, not offered for truth of contents.

United States v. Strand, 574 F.2d 993 (8th Cir. 1978). Barring prior consistent statement proper, defendant had not testified yet.

United States v. Weil, 561 F.2d 1109 (4th Cir. 1977). Admission of prior consistent statement on direct was not error since defense attorney didn't object, repetition on redirect over objection did not further impair defendant's rights.

United States v. Ochoa, 564 F.2d 1155 (5th Cir. 1977). Testimony of what two undercover narcs heard and saw established *prima facie* conspiracy.

United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977). Court upholds using grand jury transcript [careful!) where witness forgets or denies facts at trial.

United States v. Herring, 582 F.2d 535 (10th Cir. 1978). Within court's discretion to allow prior consistent statement after defense attorney asked about witness' compensation from government.

United States v. Allen, 579 F.2d 531 (9th Cir. 1978). Prior consistent to rebut prior inconsistent statement. *Accord, United States v. Lanier,* 578 F.2d 1246 (8th Cir. 1978).

United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1978). Failure to object to portions of prior consistent testimony waived any error in order which allowed state to introduce any prior consistent evidence that it wanted to.

United States v. Williams, 573 F.2d 284 (5th Cir. 1978). Dealing with witness' affidavit.

United States v. Mireles, 570 F.2d 1287 (5th Cir. 1978). One correction officer corroborated matters in other correction officer's report.

United States v..Simmons, 567 F.2d 314 (7th Cir. 1977). Inadmissible opening statement became admissible to rebut defendant's explanation.

United States v. Papia, 560 F.2d 827 (4th Cir. 1977). Typed transcripts weren't prior consistent statements but were conversations defendant said he made and heard others make.

United States v. McGrath, 558 F.2d 1102 (2nd Cir. 1977). What third party said about defendant properly corroborated with prior consistent statement.

United States v. Moskowitz, 581 F.2d 14 (2nd Cir. 1978). Witness' statement he had said on day after robbery that composite looked like robber proper.

United States v. Fritz, 580 F.2d 370 (10th Cir. 1978). Statement by officer that other officer remembered defendant from another case proved identification.

United States v. Lewis, 565 F.2d 1248 (2nd Cir. 1977). Failure to make in-court identification did not mean out of court lineup identification was hearsay.

United States v. Hudson, 564 F.2d 1377 (9th Cir. 1977). Jury entitled to consider prior identification, equivocal identification went to weight, not admissibility.

United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977). Interpret this rule to admit prior photo identification.

United States v. Franklin, 586 F.2d 560 (5th Cir. 1978). Defendant's statement he had done his job after knocking out alarm, plus returning and asking how job was going.

United States v. Evans, 572 F.2d 455 (5th Cir. 1978). Entries by defendant in calendar weren't hearsay.

United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978). Admission against witness' interest suggesting a refusal to testify not reversible error here.

United States v. Cline, 570 F.2d 731 (8th Cir. 1978). Admission was also relevant on concealment issue.

United States v. Morales, 566 F.2d 402 (2nd Cir. 1977). Transcript of admission to judge that refusal to testify was willful was admissible.

United States v. Costanzo, 581 F.2d 28 (2nd Cir. 1978). Statements of defendant's son used against defendant were made in his presence and he concurred.

United States v. Williams, 577 F.2d 188 (2nd Cir. 1978). Post conspiracy conversation, defendant did not deny involvement, adoptive admission.

United States v. Weaver, 565 F.2d 129 (8th Cir. 1977). Statements made by coconspirator about future bank robbery.

United States v. Kilbourne, 559 F.2d 1263 (4th Cir. 1977). Witness testified about defendant's silence when confronted with early, unexplained knowledge of the victim's death.

United States v. Bobo, 586 F.2d 355 (5th Cir. 1978), disapproved of on other grounds by *United States v. Singleterry*, 683 F.2d 122 (5th Cir. 1982). Codefendant's statement defendant was worried about informers not hearsay, showed state of mind about conspiracy.

United States v. Fredericks, 586 F.2d 470 (5th Cir. 1978). Government may use any evidence, including defendant's statements, in order to prove conspiracy to make the statements admissible.

United States v. Andrews, 585 F.2d 961 (10th Cir. 1978). Coconspirator and agent stating they met at coconspirator's apartment and bought cocaine showed conspiracy, defendant's statements to coconspirator when he gave him the coke.

United States v. Rosales, 584 F.2d 870 (9th Cir. 1978). Evidence sufficient to admit coconspirator's statements need not compel conviction.

United States v. Celaya-Garcia, 583 F.2d 210 (5th Cir. 1978) Heroin sale two months after charged transaction showed continuing conspiracy, tapes of defendant and coconspirators admissible.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by applicable constitutional provisions, statutes, or rules.

Source: Federal Rules of Evidence, Rule 802, (modified).

ARIZONA CASES

I. IN GENERAL

State v. Valencia, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996). Generally, out of court statements offered in evidence to prove truth of matters asserted in statements are inadmissible.

State v. Via, 146 Ariz. 108, 704 P.2d 238 (1985). Trial court did not error when it admitted a note the victim had written describing where he was going, why, and whom he was meeting. The statement was hearsay under Rule 801(C), however, Rule 802 does not bar it because it was properly admitted under Rule 803(3). The evidence was relevant and admissible to show that the "declarant acted in accordance with his stated intention to be at a certain place at a certain time."

State v. Rivera, 139 Ariz. 409, 678 P.2d 1373 (1984). Hearsay statements may be admitted for non-hearsay reasons if it is very relevant.

State v. Edwards, 136 Ariz. 177, 665 P.2d 59 (1983). Hearsay rules are applicable when deciding preliminary questions on admissibility.

State v. May, 137 Ariz. 183, 669 P.2d 616 (App. 1983). Sister's statement that she believed defendant was going to kill her sister was impermissible hearsay but the jury verdict would have been the same without testimony, therefore, harmless error.

II. OPENING THE DOOR FOR HEARSAY

State v. Lalonde, 156 Ariz. 318, 319-20, 751 P.2d 978, 979-80 (App. 1987). After murder victim's statement was introduced without objection through state witness, defendant could not subsequently object, on hearsay grounds, to statement offered as prior inconsistent statement of same witness; having allowed earlier statement into evidence without objection, defendant could not prevent trier of fact from hearing all evidence relevant to content of prior statement.

State v. Garcia, 133 Ariz. 522, 525-26, 652 P.2d 1045, 1048-49 (1982). Where defense counsel's conduct in extensively developing subject of information obtained from "silent witness" caller opened door for caller's exact statement to come in, defense counsel waived hearsay objection to admissibility of statement in defendant's prosecution for homicide.

State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982). Appellant's assertion that his Sixth Amendment right to confront witnesses against him was violated by the trial judge's admission of alleged hearsay testimony was incorrect. "Here, not only did defense counsel fail to object to the testimony, he opened the door to inquiry about the defendant's involvement in the rape-robbery incident by introducing and developing the topic on examination of Roy Vaughan. When counsel opens the whole field of inquiry, he cannot assign its fruits as error on appeal."

III. HEARSAY AS HARMLESS ERROR

Rutledge v. Arizona Bd. Of Regents, 147 Ariz. 534, 545-46, 711 P.2d 1207, 1218-19 (App. 1985). Any error in admission of testimony relevant only to determine witness' state of mind and which was not admissible under hearsay exception would not require reversal where witness' entire testimony was collateral.

State v. May, 137 Ariz. 183, 669 P.2d 616 (App. 1983). Sister's statement that she believed defendant was going to kill her sister was impermissible hearsay but the jury verdict would have been the same without testimony, therefore, harmless error.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). Tapes and diagram were clearly inadmissible hearsay.

However, the information conveyed was cumulative to other properly admitted at trial. Finally, "[s]ince the defendant, himself, had testified to substantially the same information as that contained in the hearsay statements, the issue which the statements tended to prove - that defendant had confessed and given a detailed description of the crime - was uncontested and the error was harmless."

IV. HEARSAY AS FUNDAMENTAL ERROR

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982). Statements which did not fall within any of the exceptions to the hearsay rule found in Rules 803 and 804 were inadmissible under Rule 802. "The erroneous admission of the hearsay evidence in the instant case caused fundamental error."

OTHER JURISDICTIONS

United States v. Wigerman, 549 F.2d 1192 (8th Cir. 1977). Defendant's request for "criss-cross directories" properly admitted as admission of party opponent.

United States v. Miller, 514 F.2d 41 (9th Cir. 1975). Federal probation officer testifying what state court probation revocation proceedings stated at federal probation revocation upheld.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional or physical condition. a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly-conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if:

(a) Made at or near the time of the underlying event,
(b) By, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity,
(c) Made and kept entirely in the course of that regularly conducted business activity,
(d) Pursuant to a regular practice of that business activity; and
(e) All of the above are shown by the testimony of the custodian or other qualified witness, or be certification that complies with rule 902(11).

However, such evidence shall not be admissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness or to the extent that portions thereof lack an appropriate foundation.

The term 'business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the non-occurence or non-existence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (c) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) Records of vital statistics. Records or data compilations in any form, of births, fetal deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10)Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11)Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12)Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules of practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13)Family records. Statements of fact concerning personal or family history contained in

family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established *as* a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history, important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere or no contest), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) Former testimony (non-criminal action or proceeding). Except in a criminal action or proceeding, testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Source: Federal Rules of Evidence, Rule 803, (modified).

ARIZONA CASES

I. PRESENT SENSE IMPRESSION

State v. Tucker, 205 Ariz. 157, 166, 68 P.3d 110, 116 (2003). The present sense impression exception to the rule against hearsay has three requirements: the statement must describe an event or condition, that was perceived by the declarant, and the statement must be made immediately after the event.

State v. Wooten, 193 Ariz. 357, 366, 972 P.2d 993, 1002 (App. 1998). Admission of murder victim's statement during telephone call shortly before her murder did not violate defendant's rights under Confrontation Clause where victim's statement, that defendant was in her apartment, fell within firmly-rooted present sense impression exception to the hearsay rule.

State v. Savant, 146 Ariz. 306, 705 P.2d 1357 (App. 1985) Defendant's right of confrontation was not denied when accomplice's statements during a drug deal were admitted under 803(1).

II. EXCITED UTTERANCE

State v. Cruz, 218 Ariz. 149, 160-61, 181 P.3d 196, 208-09 (2008). In analyzing the excited utterance exception to the hearsay rule, courts apply the following three-part test: (1) there must be a startling event; (2) the words spoken must be spoken soon after the event so as not to give the person speaking the words time to fabricate or reflect; and (3) the words spoken must relate to the startling event.

State v. Taylor, 196 Ariz. 584, 590, 2 P.3d 674, 680 (App. 1999). Length of time between startling event and utterance is only one factor to consider in determining whether, under the totality of the circumstances, the statement was made while in a state of nervous excitement or shock so as to be admissible under excited utterance exception to hearsay rule.

State v. Bible, 175 Ariz. 549, 596, 858 P.2d 1152, 1199 (1993). Testimony concerning statements made by victim's mother, while she was distraught and fearful because her daughter was missing, in attempting to assist the officers in finding her daughter were admissible under the excited utterance exception to the hearsay rule.

State v. Bauer, 146 Ariz. 134, 704 P.2d 264 (App. 1985). The mother of a 2 1/2 year-old child molest victim questioned the little girl 45 minutes after the incident. The victim was too young to testify but her hearsay statements were properly admitted under Rule 803(2).

State v. Rivera, 139 Ariz. 409, 678 P.2d 1373 (1984). Trial court improperly admitted mother's testimony about child molest victim's statement five to ten hours after the incident occurred. Statement was not an excited utterance because it did not occur while victim was under stress of the startling event. But see A.R.S. § 13-1416.

State v. Yslas, 139 Ariz. 60, 676 P.2d 1118 (1984). Coconspirators statement, "he hit her" was an excited utterance because the statement was made right after a startling event (an unexpected homicide).

State v. Starcevich, 139 Ariz. 378, 678 P.2d 954 (App. 1983). Although the victim had been sexually assaulted nine hours before, her statement to the waitress about being raped was admissible under the excited utterance exception because victim had been held for 24 hours against her will and victim was still in a state of shock.

State v. Maldonado, 138 Ariz. 475, 675 P.2d 735 (App. 1983). Victim's call to the police station after she'd been raped was admissible under the excited utterance exception.

State v. Crivellone, 138 Ariz. 437, 675 P.2d 697 (1983). Police officer was allowed to testify that he went to the dying victim of the robbery and asked him questions. The officer also testified about victim's conduct by which the victim answered the questions. While the victim's assertive conduct was hearsay under Rule 801(A), the statements were admissible under Rule 803(2) as excited utterances.

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). Victim's statements right after the bombing were excited utterances, however, they were not statements that victim had personal knowledge of, but rather, were merely suspicions.

State v. Conn, 137 Ariz. 148, 669 P.2d 581 (1982). Trial court did not abuse its discretion by excluding hearsay statements made by the defendant at the time of his arrest. "We agree with the appellant that the statements were not inadmissible simply because they were self serving. That objection alone would not be valid. However, the trial court was entitled to consider the content of the statement in evaluating whether it was spontaneously caused by the 'excitement' of the moment and therefore reliable." This defendant had been arrested at least twelve times previously.

State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (App. 1980). Trial court did not err in admitting statements made by a 79-year-old sexual assault victim who, "although still emotionally upset and a little confused, understood what had transpired and responded well to questions a short time after the assault" even though a psychologist testified that she would ."probably" be less than reliable if extremely agitated.

State v. Barnes, 124 Ariz. 586, 606 P.2d 802 (1980). "Lapse of time is only one factor to be considered. If the totality of the circumstances indicates that the statement was made in a state of shock or his demeanor and actions had been altered, it is admissible, even though not made immediately after the event."

State v. Barnes, 124 Ariz. 586, 606 P.2d 802 (1980). A statement is not "necessarily inadmissible because it is made in response to a question."

State v. Yee, 121 Ariz. 398, 590 P.2d 937 (App. 1979). Where defendant admitted he severely beat the declarant and testimony indicated "that the declarant was emotional, excited, crying, shaken and upset when he made his statements", the fact that the statements were in response to police questioning did not take them outside the excited utterance exception.

State v. Butcher, 120 Ariz. 234, 585 P.2d 254 (App. 1978). Allowing an officer to testify about a conversation with the victim ten minutes after he heard a radio call regarding the shooting was not an abuse of discretion

where the victim was described as "very excited" at the time of the statement.

III. THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION

State v. Barger, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App. 1990). Defendant's statements to police that he felt threatened by alleged assault victims were not within state of mind exception to hearsay rule, where they were made the day after the incident and concerned past mental condition.

State v. Via, 146 Ariz. 108, 704 P.2d 238 (1985) Trial court did not err when it admitted a note the victim had written describing where he was going, why, and whom he was meeting. The statement was hearsay under Rule 801(C), however, Rule 802 does not bar it because it was properly admitted under Rule 803(3). The evidence was relevant and admissible to show that the "(witness]/declarant acted in accordance with his stated intention to be at a certain place at a certain time."

State v. Rivera, 139 Ariz. 409, 678 P.2d 1373 (1984). 3-year-old child molest victim's state of mind was not at issue here, therefore, hearsay exception inapplicable. But *see* A.R.S. § 13-1416.

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). Victim's notes were relevant to show state of mind of declarant - the notes showed that victim intended to meet murderer.

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983). Victim's statement to nurse that defendant had drugged her was inadmissible because it did not show a relevant state of mind of the declarant.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). "In *Gause*, 107 Ariz. at 495, 489 P.2d 834, we held that 'expressions of fear by a murder victim, though they may be hearsay, are relevant, have probative value on the issue of identity, and when in human experience they have sufficient reliability, they should be admitted into evidence.' While we recognize that we could argue, as the defendant does, that the principle of *Gause* is equally applicable to cases where the defendant seeks to admit evidence that the victim was not afraid of the defendant, we need not reach that question." Here, the trial court did not abuse its discretion in excluding the evidence under Rule 403.

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). "The testimony that the victim said appellant was 'capable of anything' and had threatened her were nothing more than statements of 'memory or belief to prove the fact remembered or believed.' Such assertions are not within the Rule 803(3) exception and were not admissible."

IV. STATEMENTS FOR PUROSES OF MEDICAL DIAGNOSIS OR TREATMENT

State v. Sullivan, 187 Ariz. 599, 601-02, 931 P.2d 1109, 1111-12 (App. 1996). Two-year-old victim's statement to treating physician that defendant had caused burn lesions on victim's leg was admissible under medical diagnosis or treatment exception to rule against hearsay, in child abuse prosecution; physician's testimony that it was important for her to determine any history about those particular lesions and that history was just as important as physical examination in determining diagnosis provided sufficient foundation for admitting victim's statement through physician's testimony.

State v. Robinson, 153 Ariz. 191, 735 P.2d 801 (1987). Identity of molester is admissible as part of information on diagnosis.

State v. Thompson, 146 Ariz. 552, 707 P.2d 956 (App. 1985). Child molest victim's statements to officers were improperly admitted, however, the error was harmless. The doctor's testimony concerning father's statements about previous bruises was admissible under Rule 803(4).

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). Testimony that the victim feared the appellant was within the exception, but inadmissible anyway since the victim's state of mind is only relevant when identity or the defense of accident suicide or self-defense is raised. These defenses were not raised in this case.

State v. Lehman, 126 Ariz. 388, 616 P.2d 63 (App. 1980). Since there were no material issues in dispute to which the victim's state of mind was relevant, the statement was inadmissible.

V. RECORDED RECOLLECTION

State v. Smith, 215 Ariz. 221, 229, 159 P.3d 531, 539 (2007). Detective's reference to police report that contained statements made by prior medical examiner during autopsy of victim met the requirements for a recorded recollection, in support of finding that testimony regarding the reports, was not hearsay, in penalty phase of capital murder proceedings, where detective testified that he remembered the medical examiner pointing out trauma areas and relaying measurements, which his partner then wrote down, detective adopted the report as his own by signing it shortly after it was created and at the same time reviewed report for accuracy.

Goy v. Jones, 205 Ariz. 421, 423-24, 72 P.3d 351, 353-54 (App. 2003). Neither federal nor state law mandates the exclusion of recorded-recollection testimony simply because the form of the recorded recollection is a law-enforcement report, so long as the specific requirements for hearsay exception for recorded recollection are followed.

DeForest v. DeForest, 143 Ariz. 627, 633, 694 P.2d 1241, 1247 (App. 1985). In proceeding to determine terms of property settlement to be incorporated into *nunc pro tunc* dissolution decree, trial court erred in receiving notes of previous judge as evidence where they were not simply read into evidence but were themselves received as evidence, contrary to provision of Evidence Rule 803 regarding recorded recollections.

State v. Tudgay, 128 Ariz. 1, 623 P.2d 360 (1981). Deposition from a prior civil case did not have to meet the 803(5) foundation requirements since it was an admission by a party opponent under 801 (d)(2), which is not hearsay.

VI. RECORDS OF REGULARLY CONDUCTED ACTIVITY

Bohsancurt v. Eisenberg, 212 Ariz. 182, 193, 129 P.3d 471, 482 (App. 2006). Because the quality assurance specialists who calibrate breath-testing machines and record the results are not investigating a particular criminal matter when they perform that function, the quality assurance records they produce qualify as both public records and business records, recognized exceptions to the general exclusion of hearsay evidence.

State v. Dickens, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996). Report by defendant's employer concerning defendant's co-worker's statement about theft of his gun was not admissible in defendant's murder trial under business records exception to hearsay rule, where two-month delay in recording the information was not shown to be customary and employer's official incident report form was not used.

State v. Ritacca, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991). Duplicates of bank records were admissible as business records in prosecution for illegally conducting an enterprise absent any question as to authenticity of original or any showing that it would be unfair to admit duplicate in lieu of original.

State v. Petzoldt, 172 Ariz. 272, 274-75, 836 P.2d 982, 984-85 (App. 1991). Notebooks containing entries for marijuana sales to person identified as defendant were admissible under business records exception to hearsay rule.

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982). Testimony from a service station manager that he had been back-billed by Chevron did not fit within the business records exception for two reasons. "First, the station manager was not a custodian of Chevron's records or an otherwise qualified Chevron employee as

required by Rule 803(6)(e). Second, the evidence involves two levels of hearsay, and the second does not fit within the exception."

VII. PUBLIC RECORDS AND REPORTS

State v. King, 213 Ariz. 632, 638-39, 146 P.3d 1274, 1280-81 (App. 2006). Records of Motor Vehicle Department (MVD) showing that defendant's driver's license had been suspended were sufficiently reliable such as to permit their admission in prosecution for driving under the influence of an intoxicant (DUI), under exceptions to rule against hearsay for public and business records, though custodian for MVD records testified that she did not know who had retrieved defendant's MVD records or qualifications and training of person who might have retrieved them, as custodian identified records as being defendant's because they included his name, date of birth, address, driver's license number, and photograph, and she testified that she was "one hundred percent confident" that information in records was accurate.

Shotwell v. Donahoe, 207 Ariz. 287, 293-94, 85 P.3d 1045, 1051-52 (2004). Evidence rule on reports compiled by public agencies creates an exemption only from the requirements of the hearsay rule; it does not render any document satisfying the rule automatically admissible without regard to the resolution of other evidentiary objections that may have been made.

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983). Defendant's "prison packet" was properly admitted under Rule 803(8) even though they dropped an "i" from defendant's name and there was only one certification for the three documents contained in the packet.

State v. Dixon, 127 Ariz. 554, 622 P.2d 501 (App. 1981). "The state produced a copy of a package record properly certified by the Department of Corrections as its master file on Rupert Ray Dixon which was admitted into evidence." It was properly admitted under Rule 803(8) as a public record.

State v. Dixon, 127 Ariz. 554, 622 P.2d 501 (App. 1981). "The Department of Corrections records are not within the exception of 803(8)(B) regarding the reports of police officers and other law enforcement personnel . . . The department is a custodial agency as distinguished from a law enforcement agency." D.O.C. records are admissible, therefore, as public records under Rule 803(8).

State v. Stone, 122 Ariz. 304, 594 P.2d 558 (App. 1979). "A minute entry is properly admissible to prove a prior conviction under Rules of Evidence, Rule 803(8), the public records exception to the hearsay rule." The minute entry in this case was a certified copy.

State v. Floyd, 120 Ariz. 358, 586 P.2d 203 (App. 1978). A certified copy of a motorcycle registration was admissible. "The trial court noted 'an aura . . . of trustworthiness,' and took judicial notice of A.R.S. S 28-104(B), which imposes a duty to register vehicles. The document thus satisfied the requirements of Rule 803(8)."

VIII. LEARNED TREATISES

State v. Hardwick, 183 Ariz. 649, 653, 905 P.2d 1384, 1388 (App. 1995). Identifying common traits of child molesters is province of experts; information of that nature can only be admitted into evidence in form of expert testimony or, alternatively, in form of learned treatise if proponent has shown that treatise is reliable authority.

State v. Jensen, 153 Ariz. 171, 735 P.2d 781 (1987). The defendant's expert could not testify about a video tape on Post Traumatic Stress Disorder because the expert did not prepare the video materials.

State v. Garrison, 120 Ariz. 255, 585 P.2d 563 (1978). "Arizona's Rules of Evidence, 17A A.R.S., effective September 1, 1977, provides by Rule 803(18) that statements contained in published treatises, periodicals, or pamphlets on the subject of medicine are not excluded by the hearsay rule."

IX. REPUTATION AS TO CHARACTER

State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981). "Reputation is the opinion generally held about a person by associates or by the community at large." Here, the detective only talked to two other people about reputation, both of whom were also detectives, so the testimony of the detective was inadmissible.

X. JUDGMENT OF PREVIOUS CONVICTION

State v. Stone, 122 Ariz. 304, 594 P.2d 558 (App. 1979). A certified copy of a minute entry was properly used to prove a prior under Rule 803(8), even though it was entered after a no contest plea. The minute entry was not offered to prove facts supporting the judgment, but to prove the prior, so Rule 803(22) was not applicable.

XI. OTHER EXCEPTIONS

State v. Tinajero, 188 Ariz. 350, 353, 935 P.2d 928, 931 (App. 1997), *disapproved of on other grounds by State v. Powers*, 200 Ariz. 363, 26 P.3d 1134 (2001). Defendant's postarrest statements in which he denied driving automobile involved in fatal collision were prior consistent statements and, as such, were not admissible under "catch all" hearsay exception.

State v. Thompson, 167 Ariz. 230, 233-34, 805 P.2d 1051, 1054-55 (App. 1990). Child molestation victim's hearsay statements to third parties were erroneously admitted under catchall provision of hearsay rule; though proffered testimony exhibited sufficient guarantees of trustworthiness, victim testified at trial and court failed to consider whether hearsay statements were more probative than such testimony.

State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1984). Defendant's statements to police officer could not get in under this exception.

State v. Spratt, 126 Ariz. 184, 613 P.2d 848 (App. 1980). Trial court correctly refused to allow a witness to testify that at a prior time the defendant had told her he was innocent. Rule 803(24) "allows the court to admit evidence which, *inter alia*, although hearsay has equivalent circumstantial guarantees of trustworthiness as the other exception set forth in Rule 803. Appellant's statements of innocence do not rise to such a level."

State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (App. 1979). Trial court did not err in denying admission of hearsay statements defendant had made to a private attorney. The statements were "too remote" and "the trustworthiness of such statements is highly suspect because of their self-serving nature."

State v. Tulipane, 122 Ariz. 557, 596 P.2d 695 (1979). The "reliable" standard for the admissibility of hearsay evidence of Criminal Rule 27.7(b)(3) is the same standard as in Rule 803(24).

OTHER JURISDICTIONS

United States v. Gutierrez, 576 F.2d 269 (10th Cir. 1978). Statement of coconspirator he had been told to go ahead with transaction admissible, part of *res qestae.*

United States v. Brady, 579 F.2d 1121 (9th Cir. 1978). No offer of proof that statement was excited utterance or part of *res qestae,* so court properly excluded defense attorney's evidence as hearsay.

United States v. Strand, 574 F.2d 993 (8th Cir. 1978). Defense attorney's attempt to get statements after arrest admitted as excited utterances fails.

United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978). Tape of bugged conversation, showing state of mind of

one party, admissible to impeach defendant's explanation of what he did the night in question. CAVEAT: Rule 19.3(c) should be consulted about grand jury impeachment.

United States v. Wellendorf, 574 F.2d 1289 (5th Cir. 1978). Defendant's testimony about advice he received at a meeting was not hearsay, but exclusion was not reversible error.

United States v. Arias, 575 F.2d 253 (9th Cir. 1978). Official trial transcript admissible to show oath taken in perjury prosecution.

United States v. Williams, 571 F.2d 344 (6th Cir. 1978). Prior sworn statement admissible where witness claimed no recollection of some conversations with defendant in statement, disputing parts of statement did not make it inadmissible.

United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978). Auto dealership records used to keep track of autos sufficiently authenticated by general manager.

United States v. Evans, 572 F.2d 455 (5th Cir. 1978). Fact authenticator not employed at time records were made was irrelevant; competency of preparer of record doesn't affect admissibility, may affect weight.

United States v. Powers, 572 F.2d 146 (8th Cir. 1978). Xeroxes of business records of firearms manufacturer sufficiently authenticated.

United States v. Colyer, 571 F.2d 941 (5th Cir. 1978). Assistant bank manager could testify about tickets kept after card was stolen despite Sixth Amendment violation allegation.

United States v. Little, 567 F.2d 346 (8th Cir. 1977). Copies of corporate checks admitted.

United States v. Holladay, 566 F.2d 1018 (5th Cir. 1978). Bookkeeping notebooks admitted to show unreported gross receipts.

United States v. Hines, 564 F.2d 925 (10th Cir. 1977). Invoice or bill of sale helped victim show she owned vehicle.

United States v. Rose, 562 F.2d 409 (7th Cir. 1977). Custodian, not record maker, properly admitted record.

United States v. Reese, 561 F.2d 894 (D.C. Cir. 1977). No foundation for car rental agreement, properly excluded.

United States v. Rich, 580 F.2d 929 (9th Cir. 1978). Absent showing public records were untrustworthy, lack of foundation didn't prejudice defendant and the lack of public record of defendant's named alibi witness was not reversible error.

United States v. Lanier, 578 F.2d 1246 (8th Cir. 1978). Refusal to strike audit testimony about failure to find certain records, computer records of Federal Reserve Bank were in evidence.

United States v. Hansen, 583 F.2d 325 (7th Cir. 1978). Records of building code violations.

United States v. Evans, 572 F.2d 455 (5th Cir. 1978). Rule inapplicable, government agent merely analyzed evidence presented at trial.

United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978). IRS employee proved defendant didn't file income tax returns.

United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978). Confession by codefendant was properly admitted under

(24) she testified, her story was strongly corroborated by agents, it agreed with defendant's and otherwise it was a lying contest between them.

United States v. Bailey, 581 F.2d 341 (3rd Cir. 1978). Purpose of rule satisfied where nondisclosure until trial was in good faith and other party had adequate opportunity to contest the evidence.

United States v. Williams, 573 F.2d 284 (5th Cir. 1978). Affidavit given IRS by defendant's employee proper impeachment and substantive evidence.

United States v. Smith, 571 F.2d 370 (7th Cir. 1978). One witness repeats first's story, first witness available to cross-examine.

United States v. Atkins, 558 F.2d 133 (3rd Cir. 1978). Witness who heard defendant admit robbery and murder inadmissible under 803(24) but should be admissible under 804(b)(3).

United States v. Zeidman, 540 F.2d 314 (7th Cir. 1976). Fact that no records were turned up in search admissible.

United States v. Edwards, 539 F.2d 689 (9th Cir. 1976). Requirements for past recollection recorded. See *United States v. Senak*, 527 F.2d 129 (7th Cir., 1975).

United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976). Preparer business record unnecessary where person who knows record was made in course of business is available.

United States v. Robinson, 530 F.2d 1076 (D.C. Cir. 1976). Statement of 2nd officer that 1st officer told 2nd officer that defendant threatened him admissible for rehabilitation when defendant implied by cross-examination 1st officer was lying.

United States v. Calvert, 523 F.2d 895 (8th Cir. 1975). Declarant's out of court statement of intention admissible if doing it is at issue.

McLaughlin v. Vinzant, 522 F.2d 448 (1st Cir. 1975). Statements of witness made on 2nd floor after observing first floor shooting spontaneous and admissible.

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) *Definition of unavailability*. 'Unavailability as a witness" includes situation in which the declarant --

(3) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(4) persists in refusing to testify concerning subject matter of the declarant’s statement despite an order of the court to do so; or

(5) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(6) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(7) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)

(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony (criminal action or proceeding*). Former testimony in criminal actions or proceedings as provided in Rule 19.3(c), Rules of Criminal Procedure.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statements against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history*. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [r e s e r v e d]

(6) *Forfeiture by wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(7) *Other exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Source: Federal Rules of Evidence, Rule 804.

Cross Reference

17 A.R.S. Rules of Criminal Procedure, Rule 19.3c.

ARIZONA CASES

I. IN GENERAL

State v. Prasertphong, 206 Ariz. 70, 81, 75 P.3d 675, 686 (2003). A declarant who asserts his Fifth Amendment right not to testify is "unavailable" for purposes of the Confrontation Clause.

State v. Whitney, 159 Ariz. 476, 484, 768 P.2d 638, 646 (1989). Fact that witnesses were unavailable to testify because they gave false addresses, and fact that no one could be found under names given by them, did not disqualify statements from admission under excited utterance exception to hearsay rule.

State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209 (App. 1984). A victim who could not remember what she did with a towel taken from a rape scene was legally unavailable, (on that issue) Rule 804(a)(3), and therefore the statement was not admissible as a prior statement by the victim, Rule 801(d)(1). The court erred when it allowed an investigating officer to testify the victim said she got the towel from the rape scene because the evidence linked defendant to the rape, and went beyond the preliminary matters allowed under Rule 104(a). The error was harmless because of overwhelming evidence.

State v. Martin, 139 Ariz. 466, 679 P.2d 489 (1984). Under rule 804, the state must show that the declarant is truly unavailable for cross-exam. The confrontation clause is usually violated when hearsay is admitted but the declarant is not produced for cross-exam. The hearsay allowed under 804 must fall within a well-recognized hearsay exception because it then bears indicia of reliability.

State v. Just, 138 Ariz. 534, 675 P.2d 1353 (App. 1984). Child's lack of memory rendered her unavailable for cross-exam.

State v. Edwards, 136 Ariz. 177, 665 P.2d 59 (1983). The confrontation clause of the 6th amendment requires a showing that the witness is unavailable before a hearsay statement is admitted under 804.

II. FORMER TESTIMONY

State v. Shearer, 164 Ariz. 329, 336-37, 793 P.2d 86, 93-94 (App. 1989). Trial testimony of witness who died during cross-examination was not admissible in subsequent prosecution, pursuant to former testimony exception to hearsay rule, in that defendant had not been afforded opportunity for full cross-examination prior to witness' death.

State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985). The trial court correctly admitted the transcript of the testimony of a witness who had been hypnotized, after editing the transcript to delete post-hypnotic recall. The witness was incompetent so the testimony was properly read under Rule 804(b)(1). Defendant was not prejudiced because the entire cross-examination was read.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). Where defendant's girlfriend testified at the preliminary hearing, then married him before trial, "[t]he testimony given at the preliminary hearing was generally admissible as 'Prior Recorded Testimony' under Rule 19.3(c) Arizona Rules of Criminal Procedure, 17 A.R.S."

State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981). "Because we are of the opinion that defendant had the opportunity and similar motive to develop Jones' testimony at the suppression hearing as he would have had at

trial, we find the transcript testimony to have been properly admitted under the hearsay exception of Rule 804(b)(1)."

III. BELIEF OF IMPENDING DEATH

State v. Valencia, 186 Ariz. 493, 500, 924 P.2d 497, 504 (App. 1996). Sense of impending death necessary to be shown for statement to qualify for dying declaration exception to hearsay rule can be shown either by express language or by circumstances which compel conclusion that declarant believed he was dying.

State v. Ruelas, 174 Ariz. 37, 42, 846 P.2d 850, 855 (App. 1992). Manslaughter victim's statement was not made while he believed his death was imminent, so as to render statement admissible under dying declaration exception to hearsay rule; victim never said he thought he was dying, and circumstances surrounding statement did not unquestionably indicate that he thought he was going to die.

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). Statements may be entered if declarant was under a sense of impending death; declarant does not have to directly assert that he believes he is dying. In this case, bombing victim's statements in the hospital were admissible under this exception because of his critical condition.

IV. STATEMENT AGAINST INTEREST

State v. Pandelli, 200 Ariz. 365, 372-73, 26 P.3d 1136, 1143-44 (2001), judgment vacated on other grounds by 536 U.S. 953, 122 S.Ct. 2654 (2002). To admit statement against declarant's interest offered to exculpate accused, (1) the declarant must be unavailable, (2) the statement must be against the declarant's interest, and (3) there must be corroborating evidence that indicates the statement's trustworthiness; all three requirements must be satisfied.

State v. Barger, 167 Ariz. 563, 567, 810 P.2d 191, 195 (App. 1990). Defendant's statements to police on the day following alleged assaults, asserting that he had felt threatened by the victims, were not against interest so as to be within statement against interest hearsay exception.

State v. Lopez, 159 Ariz. 52, 55, 764 P.2d 1111, 1114 (1988). In determining admissibility under statement against interest exception to hearsay rule, trial judge does not determine ultimate questions of credibility; rather, trial judge's responsibility is only to determine whether reasonable person could conclude that declarant's statements could be true.

State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1984). Defendant's exculpatory statement to the police officer couldn't get in under this exception.

State v. Darby, 123 Ariz. 368, 599 P.2d 821 (App. 1979). On appeal, the court agreed with the California Supreme Court's holding that their similar rule "is inapplicable to evidence of all or part of a statement not in itself disserving to the interest of the declarant."

State v. Macumber, 119 Ariz. 516, 582 P.2d 162 (1978). Trial court correctly kept out testimony that somebody else claimed to have committed the murders since "'the testimony of the witnesses relating to statements made by Valenzuela lack sufficient circumstantial probability of trustworthiness surrounding those declarations to justify their admission into evidence.'"

V. OTHER EXCEPTIONS

State v. Valencia, 186 Ariz. 493, 500-01, 924 P.2d 497, 504-05 (App. 1996). Victim's out of court identification of Defendant as his assailant was admissible under residual exception to hearsay rule and was not barred by confrontation clause, in light of determinations that victim was in grave physical

condition, knew defendant from past contacts, had no motive to fabricate, and immediately and unequivocally identified defendant.

State v. Luzanilla, 179 Ariz. 391, 394-95, 880 P.2d 611, 614-15 (1994). Mere fact that witness testified under oath during codefendant's trial was not alone sufficient to allow admission of that testimony in defendant's trial under residual hearsay exception and under confrontation clause.

State v. Shearer, 164 Ariz. 329, 337-38, 793 P.2d 86, 94-95 (App. 1989). Testimony of crucial witness, who died during cross-examination at first trial, was admissible at second trial under residual exception to hearsay rule; witness had testified under oath at time when he believed he would be fully cross-examined; he had been exhaustively cross-examined on same matters at pretrial deposition; and corroboration of witness' trial statements was abundant.

State v. Salazar, 146 Ariz. 547, 707 P.2d 951 (App. 1985) After wife of defendant, who had killed and injured people while driving drunk, said she could not remember the accident, the state properly allowed her impeachment under 801 (d)(1), or under Rule 804(B)(5) if the wife really lost her memory and was, therefore, unavailable.

State v. Ramirez, 142 Ariz. 171, 688 P.2d 1063 (App. 1984). Statements the murder victim made to an Episcopal priest were improperly admitted under Rule 804(b)(5) because they were only marginally relevant and were not "strongly probative and circumstantially reliable." However, the lack of strong probative value made their admission harmless error.

State v. Robles, 135 Ariz. 92, 659 P.2d 645 (1983). The Arizona Supreme Court holds that the trial judge must look at each case individually and determine the reliability of the evidence based upon the circumstance of the situation. "This approach requires that the evidence be reliable within the spirit rather than the letter of Rule 804(b)".

State v. Just, 138 Ariz. 534, 675 P.2d 1353 (App. 1984). The trial court should have admitted a prior statement by a child witness about the murder of her mother under Rule 804(b)(5), but evidently did not because the prosecutor had not given the requisite notice that it intended to use the hearsay. "We observe in passing that since the defense had long had access to the witness, and we presume access to the police reports, the failure to give formal notice that the state would use the hearsay would probably not have prejudiced the defense. It is difficult to imagine just what more the defense could have done or what it could have done differently had it received notice."

State v. Jones, 123 Ariz. 373, 599 P.2d 826 (App. 1979). What the victim told a detective about defendant's appearance while she was making a composite picture of him was inadmissible since her statements lacked equivalent circumstantial guarantees of trustworthiness.

State v. Tulipane, 122 Ariz. 557, 596 P.2d 695 (1979). Trial court did not abuse its discretion when it refused to allow testimony regarding why the Terros Detox Service stopped using St. Luke's hospital for testing since it lacked '"equivalent circumstantial guarantees of trustworthiness' as the other exceptions to the hearsay rule enunciated in Rule 804 . . ."

OTHER JURISDICTIONS

California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970). Testimony at preliminary hearing satisfies confrontation clause of Constitution.

United States v. Pelton, 578 F.2d 701 (8th Cir. 1978). Fact witness' attorney said he was going to advise witness not to testify did not make him unavailable.

United States v. Mangan, 575 F.2d 32 (2nd Cir. 1978). Although codefendant was actually unavailable, he wasn't within this rule, since this rule requires a court ruling that the desired testimony is privileged.

United States v. Hyde, 574 F.2d 856 (5th Cir. 1978). Admission that person had been in a complex drug conspiracy.

United States v. Treio-Zambrano, 582 F.2d 460 (9th Cir. 1978). Affidavit offered by codefendant to get second codefendant a severance properly rejected in third codefendant's trial since it did not exculpate the codefendant.

United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978). Circumstances did not clearly indicate trustworthiness, made during arguments in prison.

United States v. Thomas, 571 F.2d 285 (5th Cir. 1978). Statement by codefendant at preliminary hearing defendant had nothing to do with the robbery could be offered by state or defendant, when codefendant didn't testify, 804(b)(3) is not limited to direct confessions of guilt. *But see Oropeza, infra.*

United States v. Vecchiarello, 569 F.2d 656 (D.C. Cir. 1977). Sworn deposition in civil case admission against interest, even though character not in evidence.

United States v. Oropeza, 564 F.2d 316 (9th Cir. 1977). Convicted coconspirator's statements properly excluded, they didn't admit guilt, just said defendant didn't do it, weren't sufficient indicia of reliability.

United States v. Mackin, 561 F.2d 958 (D.C. Cir. 1977). Witness recanting 2 1/2 years after the trial not reliable, no new trial.

United States v. Santarpio, 560 F.2d 448 (1st Cir. 1978). Statements against bookmaker's interests, constituted probable cause for wiretap.

United States v. Medico, 557 F.2d 309 (2nd Cir. 1977). Unknown bystander shouted license number of getaway car to bank employee.

United States v. White, 553 F.2d 310 (2nd Cir. 1977). Written statement of murdered witness she was a prostitute and defendant accompanied her across state lines, against penal interest and admissible.

United States v. Ward, 552 F.2d 1080 (5th Cir. 1977). Sufficient guarantees of trustworthiness here to let in hearsay statement of fugitive which did not fit any other exception.

United States v. Davis, 551 F.2d 233 (8th Cir. 1977). While signed confession was not substantive evidence [see NOTE to Rule 801, Arizona Rule broader than Federal], and its use as substantive evidence was improper, it was cumulative with 1st trial testimony and therefore harmless.

United States v. Mathis, 550 F.2d 180 (4th Cir. 1977). Testimony of missing witness from prior trial admissible when witness could not be located.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Source: Federal Rules of Evidence, Rule 805.

ARIZONA CASES

State v. Montano, 136 Ariz. 605, 667 P.2d 1320 (1983). There were three levels of hearsay where a caller in a bar stated that "a 5 foot 8 Mexican over in the Arrow Head Bar was saying that he had killed a black man. . ."

The defense could not get this in because no hearsay exception was applicable to the declarant's statement in the bar or the caller's statement.

State v. McGann, 132 Ariz. 296, 645 P.2d 811 (Ariz. 1982). "The fact that Chevron's records show that the station manager was back-billed is within the business records exception. But the customers' statements that their signatures were unauthorized, whether shown directly by the statements in the records or by inference from Chevron's business practices, constitute a second level of potential hearsay. Multiple hearsay is not admissible, unless each part of it meets a hearsay exception." (Emphasis added)

OTHER JURISDICTIONS

United States v. Ettore, 387 F.Supp. 582 (E.D.Pa. 1975). Proper to refuse to allow defense attorney to impeach state's experts with statements of deputy county attorney from newspaper -- double hearsay.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), OR (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as witness. evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. if the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Source: Federal Rules of Evidence, Rule 806.

ARIZONA CASES

State v. Ruggiero, 211 Ariz. 262, 266, 120 P.3d 690, 694 (App. 2005). Defendant's right to confrontation was not violated where, after the trial court's admission of hearsay statement that witness's former boyfriend had told her that he had killed the victim, police officer testified in impeachment that the boyfriend had told him that defendant had shot the victim.

State v. Huerstal, 206 Ariz. 93, 104, 75 P.3d 698, 709 (2003). At retrial, non-witness accomplice's confession to police in which he claimed murder defendant did all the shooting was admissible under hearsay exception for inconsistent statement only for limited purpose of impeaching testimony that accomplice had shot all three victims, and only if statement's prejudicial effect did not outweigh probative value.

State v. Hernandez, 191 Ariz. 553, 555-56, 959 P.2d 810, 812-13 (App. 1998). Trial court was within its discretion, in prosecution for second degree murder, in admitting non-testifying defendant's prior felony convictions to impeach his excited utterance, made to 911 operator, that victim attacked him with two broken bottles and that he shot victim in self-defense.

State v. Valencia, 186 Ariz. 493, 501, 924 P.2d 497, 505 (App. 1996). Inconsistent testimony which would be introduced to impeach victim's out-of-court identification of defendant was admissible under rule of evidence permitting admission of testimony to impeach hearsay just as if declarant had testified at trial.

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982). Trial court did not err in permitting the prosecutor to ask the defendant's mother if she knew her son had married the declarant. The declarant had testified at the preliminary hearing and then married defendant prior to trial. During trial the defendant tried to impeach

the declarant's credibility by showing that she was an alcoholic and a liar. "[T]he State argued that the evidence of marriage warranted an inference that Rita's character was not so bad as defendant claimed at trial. The evidence was admissible for this purpose, see, Rule of Evidence 806."

OTHER JURISDICTIONS

United States v. Smith, 571 F.2d 370 (7th Cir. 1978). Where one witness repeated the story of another witness in the form of a hearsay statement, defense attorney's right to cross was not violated since the hearsay testimony did not contain damaging identification and the original witness was available for cross.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision. The requirement of authentication or identification *as* a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by applicable statute or rules.

Comment

This rule is declaratory of general evidence law and deals only with identification or authentication and not with grounds for admissibility.

Source: Federal Rules of Evidence, Rule 901.

ARIZONA CASES

I GENERAL RULE

State v. Haight-Gyuro, 218 Ariz. 356, 358, 186 P.3d 33, 35 (App. 2008). For evidence to be properly authenticated, the trial court must be satisfied that the record contains sufficient evidence to support a jury finding that the offered evidence is what its proponent claims it to be; the court does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic.

State v. Lehr, 201 Ariz. 509, 520, 38 P.3d 1172, 1183 (2002). The Due Process Clause of the Fourteenth Amendment requires the court to ensure that any pretrial identification procedures are conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial; it is the likelihood of misidentification which violates a defendant's right to due process.

State v. Best, 146 Ariz. 1, 703 P.2d 548 (App. 1985). There was sufficient foundation, under Rule 901 (b)(4), that defendant wrote receipt and address label of package containing marijuana where the receipt was recovered at defendant's home and the shipper left the package in defendant's roommate's car.

State v. Stotts, 144 Ariz. 72, 695 P.2d 1110 (1985). This case covers a variety of material admissible or inadmissible under 901.

State v. Emery, 141 Ariz. 549, 688 P.2d 175 (1984). Rule 901(a) may be satisfied by testimony that the evidence is what it is claimed to be, Rule 901 (b)(1) or by evidence of a combination of distinctive characteristics and circumstances which show the evidence is what it claims to be, Rule 901(b)(4). The trial court correctly admitted evidence which the testifying detective said another detective bagged and marked in his presence. The fact that the testifying detective did not see some of the markings made went to the weight, rather than the admissibility of the evidence.

State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984). A hand-written map showing the location where the murder victim's car was found was properly admitted under Rule 901(a) as a map found in the defendant's apartment; who made the map went to the weight of the evidence and not its admissibility. Likewise the murder victim's rent receipt book was properly admitted under Rule 901(a) after a detective testified that it was a rent receipt book found on a desk in defendant's apartment. The murder victim's initials were on the first 55 receipts, but not the last 8, and the state argued that defendant killed the victim for the money he collected but did not turn over to her.

State v. Washington, 132 Ariz. 429, 646 P.2d 314 (App. 1982). "A proponent of physical evidence need not disprove the possibility of tampering if a reasonable showing is made that the item is intact and unaltered."

II. NONEXPERT OPINION ON HANDWRITING

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). The victim's co-worker of 14 years who was familiar with victim's handwriting could sufficiently authenticate victim's handwriting.

III. VOICE IDENTIFICATION

State v. Gortarez, 141 Ariz. 254, 686 P.2d 1224 (1984). Police officers could give their opinion that voice on tape was defendant's as long as the person identifying the voice had heard the voice '"at any time connecting it with the alleged speaker."'

IV. PUBLIC RECORDS OR REPORTS

State v. King, 213 Ariz. 632, 635-36, 146 P.3d 1274, 1277-78 (App. 2006). Records of Defendant's prior conviction for driving under the influence of an intoxicant (DUI) from municipal court were properly authenticated. Records were attached to cover letter from court clerk, which stated that she had searched court's records under name provided to her and that records she produced were court's records for that individual.

State v. Stotts, 144 Ariz. 72, 695 P.2d 1110 (1985). This case covers a variety of material admissible or inadmissible under 901.

State v. Stough, 137 Ariz. 121, 669 P.2d 99 (App. 1985). Certified public records of defendant's indictment, guilty plea, judgment and mittimus of prior Hawaii convictions had fingerprints and photographs accompanying them. The fingerprints and photos did not have to be certified separately.

State v. Rhymes, 129 Ariz. 56, 628 P.2d 939 (1981). "The testimony established the origin and contents of the finger print card, and it was properly admitted as an official record." An evidence technician from the sheriff's office testified that he took the card from the office's master file which is maintained as part of their official records and also testified to the process by which fingerprints are entered and updated in the files.

OTHER JURISDICTIONS

United States v. Olson, 575 F.2d 32 (2nd Cir. 1978). Income tax forms sufficiently identified to be used as exemplars of defendant's handwriting.

United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978). Comparison photos sufficiently authenticated.

United States v. Hyatt, 565 F.2d 229 (2nd Cir. 1977). Statement used for identification insufficiently authenticated.

United States v. Wofford, 562 F.2d 582 (8th Cir. 1977). Proper for court to remind prosecutor he technically had not offered exhibits.

United States v. Richardson, 562 F.2d 476 (7th Cir. 1976). Eyewitnesses sufficiently authenticated surveillance photos by observing them at trial.

United States v. Pitts, 569 F.2d 343 (5th Cir. 1978). One shot comparison by attorney for litigation properly excluded.

United States v. Rich, 580 F.2d 929 (9th Cir. 1978). Prosecutor's invitation to compare exhibits not error since they could have done so without prosecutor's suggestion.

United States v. Gutierrez, 576 F.2d 269 (10th Cir. 1978). Cashier's check sent to heroin source relevant and properly admitted.

United States v. Thomas, 586 F.2d 123 (9th Cir. 1978). Agent who identified voice on tape spoke to defendant on phone three times.

United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978). Inventory schedule used to confirm presence of vehicles.

United States v. Holladay, 566 F.2d 1018 (5th Cir. 1978). Notebooks showed unreported gross receipts.

United States v. Stearns, 550 F.2d 1167 (9th Cir. 1977). Photos taken from defendants sufficiently oriented as to time and place by extraneous evidence.

United States v. Vitale, 549 F.2d 71 (8th Cir. 1977). Officer who spoke with defendant twice could testify he recognized defendant's voice on phone.

United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976). Conversations between narc and defendant enable narc to identify defendant's voice on tape of phone call.

United States v. Albergo, 539 F.2d 860 (2nd Cir. 1976). Not unduly suggestive for police officer, after hearing tape of defendant, to go to bar and listen to defendant.

United States v. Standing Soldier, 538 F.2d 196 (8th Cir. 1976). Police officer's opinion defendant wrote threatening note proper after police officer compared note to defendant's written statement.

United States v. Santiago, 534 F.2d 758 (7th Cir. 1976). Fact many people had access to safe, without evidence of tampering, did not break chain of custody.

United States v. Wilson, 532 F.2d 641 (8th Cir. 1976). Coded drug sale notebook admissible where informant said defendant kept records of sales in notebooks.

United States v. Natale, 526 F.2d 1160 (2nd Cir. 1975), cert. denied 96 S.Ct. 1724 (1976). Proof of connection between defendant and exhibit may be by circumstantial evidence.

United States v. Woodson, 526 F.2d 550 (9th Cir. 1975). Handwriting may be compared by jurors, with or without expert opinion.

United States v. Jenkins, 525 F.2d 819 (6th Cir. 1975). Admission of voiceprint identification proper.

United States v. Starks, 515 F.2d 112 (3rd Cir. 1975). When colorable attack is made on tape's accuracy, then the burden of proving chain of custody is on party introducing tape.

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the

united states, or of any state, district, commonwealth, territory, or insular possession thereof, or the panama canal zone, or the trust territory of the pacific islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation of execution.

(2) *Domestic public documents not under seal*. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature *and* official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain or certificates of genuineness of signature and official position relating the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records*. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed an actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any applicable statute or rule.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals*. Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like*. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents*. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10)*Presumptions under statutes*. Any signature, document, or other matter declared by applicable statute to be presumptively or *prima facie* genuine or authentic.

(11)*Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person certifying that

the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with fair opportunity to challenge them.

(12) *Certified foreign records of regularly conducted activity*. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with fair opportunity to challenge them.

Comment

The language "general commercial law" in (9) is carried forward from the Federal Rule. In Arizona, the reference is to the Uniform Commercial Code as adopted in this State.

Source: Federal Rules of Evidence, Rule 902.

ARIZONA CASES

State v. Reasoner, 154 Ariz. 377, 742 P.2d 1363 (App. 1987). A driver's license is self-authenticating.

I. DOMESTIC DOCUMENTS UNDER SEAL

State v. Hooper, 145 Ariz. 538, 703 P.2d 482 (1985). Judge entered defendant's conviction properly even though the judge did not have a seal, the clerk of the court who certified the judge's signature did and thus Rule 902(2) was satisfied.

State v. Corrales, 135 Ariz. 105, 659 P.2d 658 (App. 1982). A computer printout of the defendant's driving record was properly authenticated and admissible. "The printout itself was certified and the certifying person's

signature and status as custodian of the record was attested to by the Assistant Director of the Department of Transportation, Motor Vehicle Division. This certificate bore the seal of the Department of Transportation of the State of Arizona. Compliance with Rule 902, Arizona Rules of Evidence, 17A A.R.S., was therefore accomplished."

State v. Simmons, 131 Ariz. 482, 642 P.2d 479 (App. 1982). The state used documents from the Ohio State Reformatory to prove defendant's prior conviction. The documents were prefaced by a three-part certificate. In the first certification, which was under a seal purporting to be that of the Ohio State Reformatory, Frank H. Gray certified that he was the superintendent and custodian of records and that the attached documents were true copies of a portion of those records. This first part complied with Rule 902(1) and "the second and third portions of the certificate were actually superfluous, and served only to authenticate the certificate of the superintendent in the manner provided by Rule 902(2)."

II. DOMESTIC PUBLIC DOCUMENTS NOT UNDER SEAL

State v. LeMaster, 137 Ariz. 159, 669 P.2d 592 (App. 1985). Documents of defendant's prior conviction in Oklahoma were properly self-authenticated when the acting director of the Oklahoma Department of Corrections certified the documents and the office of the Secretary of State certified the acting director's authority and signature.

State v. Simmons, 131 Ariz. 482, 642 P.2d 479 (App. 1982). See, synopsis, *supra*.

State v. Floyd, 120 Ariz. 358, 586 P.2d 203 (App. 1978). "The certified copy of the registration was signed by its custodian, whose signature was in turn verified by the statement under seal of the assistant director of the Department of Transportation, Motor Vehicle Division. The copy was therefore within the self-authentication provisions of Rule 902(2). . .")

III. CERTIFIED COPIES OF PUBLIC RECORDS

State v. Cons, 208 Ariz. 409, 415-16, 94 P.3d 609, 615-16 (App. 2004). For sentence enhancement purposes, certified copies of court records are self-authenticated documents that are properly offered in support of an allegation of prior convictions.

Matter of Appeal in Yavapai County Juvenile Action No. J-9365, 157 Ariz. 497, 501 -02, 759 P.2d 643, 547-48 (App. 1988). In parental rights termination proceeding, juvenile court did not err in admitting certified copy of father's record of conviction of sexual abuse of his daughter as a self-authenticating document, notwithstanding father's claim that judgment and conviction were legally invalid because he was mentally incompetent at time they were entered against him.

State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985). A letter from the DOC that defendant was on parole did not meet the foundation requirements of Rule 902(2) and (4).

State v. Corrales, 135 Ariz. 105, 659 P.2d 658 (App. 1982). A computer printout of the defendant's driving record was properly authenticated and admissible. "The printout itself was certified and the certifying person's signature and status as custodian of the record was attested to by the Assistant Director of the Department of Transportation, Motor Vehicle Division. This certificate bore the seal of the Department of Transportation of the State of Arizona. Compliance with Rule 902, Arizona Rules of Evidence, 17A A.R.S., was therefore accomplished."

State v. Simmons, 131 Ariz. 482, 642 P.2d 479 (App. 1982). See, synopsis, *supra*.

State v. Moreno, 128 Ariz. 33, 623 P.2d 822 (App. 1980). Rule 902(4) "does not distinguish between 'public records' and 'official records.'" The certified copy of the defendant's "scar sheet" from the Arizona Department of Corrections was properly admitted to show identification in proving defendant's prior convictions.

State v. Stone, 122 Ariz. 304, 594 P.2d 558 (App. 1979). "Since an original minute entry would have been admissible, the certified copy of the May 21 minute entry was properly admissible pursuant to Rules of Evidence, Rules 902(4) and 1005."

OTHER JURISDICTIONS

United States v. Rich, 580 F.2d 929 (9th Cir. 1978). No objection to lack of foundation that a diligent search of the record was made, evidence not plain error since there was nothing to show the records were untrustworthy.

United States v. Moore, 555 F.2d 658 (8th Cir. 1977). Certified copy of Post Office records admissible, without testimony, as substantive evidence.

United States v. Harris, 551 F.2d 621 (5th Cir. 1977) Certificates defendant not have license for gun proper despite lack of notation files diligently searched.

United States v. Farris, 517 F.2d 226 (7th Cir. 1975), cert. denied 96 S.Ct. 189 (1975). Officially certified computer data compilations admissible.

United States v. Leal, 509 F.2d 122 (9th Cir. 1975). Hotel records of Hong Kong motel admissible as public record.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Source: Federal Rules of Evidence, Rule 903.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. 'Photographs' include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. an 'original' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'.

(4) *Duplicate.* A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Source: Federal Rules of Evidence, Rule 1001.

ARIZONA CASES

Phoenix Baptist Hosp. & Medical Center, Inc. v. Aiken, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994). Financial agreement in which patient's husband agreed to pay for patient's medical expenses out of his separate property was admissible, despite fact that hospital employee who laid foundation for agreement did not witness husband sign agreement and fact that no affidavit accompanied hospital's evidence containing omitted page of agreement with husband's signature, where there was no evidence suggesting husband's signature had been forged and hospital's attorney signed evidence containing omitted page and explained omission was caused by clerical error.

State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). Book containing information on explosive devices as well as a discussion of the use of blasting caps and electronics detonation was properly admitted in light of the fact that victim was killed by a device that used electronically detonated blasting caps.

OTHER JURISDICTIONS

United States v. Rangel, 585 F.2d 344 (8th Cir. 1978). Merchant's copies of charge card receipts, same as customer's copies despite claim altered receipts weren't best evidence.

United States v. Morgan, 555 F.2d 238 (9th Cir. 1977). "Xerox" of original admissible since there was no protest that xerox was any different from original or original altered.

United States v. Lee, 541 F.2d 1145 (5th Cir. 1976). Failure admit hearsay at suppression hearing where rules not apply, constitutes reversible error.

RULE 1002. REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by applicable statute or rule.

Source: Federal Rules of Evidence, Rule 1002 (modified).

Cross Reference

Admissibility in evidence of certified copies of documents on file with state and county officers: See A.R.S. S 12-2263.

ARIZONA CASES

Strawberry Water Co. v. Paulsen, 220 Ariz. 401, 406, 207 P.3d 654, 659 (App. 2008). Water company was not required to prove ownership of water using sales documents and ownership certificates under the best evidence rule, but rather could use any admissible evidence to establish its rights to water which pond owners used to fill pond.

OTHER JURISDICTIONS

United States v. Madera, 574 F.2d 1320 (5th Cir. 1978). Doesn't apply to testimony records, didn't contain any reference to matter.

United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir. 1976). Best evidence rule applies only to contents of documents. *Accord United States v. Conway*, 507 F.2d 1047 (5th Cir. 1975.

United States v. Littlebear, 531 F.2d 896 (8th Cir. 1976). Photos of deceased lying on floor establish *corpus delecti*.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Source: Federal Rules of Evidence, Rule 1003.

ARIZONA CASES

State v. Ritacca, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991). Duplicates of bank records were admissible as business records in prosecution for illegally conducting an enterprise absent any question as to authenticity of original or any showing that it would be unfair to admit duplicate in lieu of original

Johnson v. State, 33 Ariz. 354, 359-60, 264 P. 1083, 1085 (1928). Copy of letter written defendant and in his possession was admissible without demand for production of original.

OTHER JURISDICTIONS

United States v. Denton, 556 F.2d 811 (6th Cir. 1977). General objection that original tapes should be used did not question authenticity of composite tape of excerpted conversations from original, or show unfairness, so the admission of composite was proper.

United States v. Morgan, 555 F.2d 238 (9th Cir. 1977). "Xerox" of original admissible since no protest any different from original or original was altered.

United States v. Gerhart, 538 F.2d 807 (8th Cir. 1976). Xerox of xerox of check "duplicate" and admissible absent genuine issue as to authenticity.

United States v. Rodriquez, 524 F.2d 485 (5th Cir. 1975) cert. denied 96 S.Ct. 1474 (1976). Unauthenticated xerox of car title made by narc admissible absent claim original was wrong.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtained. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Source: Federal Rules of Evidence, Rule 1004.

ARIZONA CASES

*Gonzalez v. Satrustegu*i, 178 Ariz. 92, 97, 870 P.2d 1188, 1193 (App. 1993). Original writing is not required and contents may be established by other evidence if original has been lost for reasons other than bad faith.

State v. Thomas, 148 Ariz. 225, 714 P.2d 395 (1985). Testimony that boyfriend had seen the letters written to victim by defendant and then boyfriend threw them away was inadmissible to impeach defendant's testimony.

OTHER JURISDICTIONS

United States v. Pitts, 569 F.2d 343 (5th Cir. 1978). Attorney permitted to testify about contents of receipt.

United States v. Gerhart, 538 F.2d 807 (8th Cir. 1976). Government not held to clear and convincing standard of authenticity of double xerox by best evidence rule.

United States v. Standing Soldier, 538 F.2d 196 (8th Cir. 1976). No error allow police officer to compare threat note with defendant's statement and testify they are same writing.

United States v. Jordano, 521 F.2d 695 (2nd Cir. 1975). No error to refuse "copy" of junkyard receipt which gave defendant alibi he claimed to have lost original and did not call junkyard owner or produce junkyard records.

RULE 1005. PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Source: Federal Rules of Evidence, Rule 1005.

Cross Reference

Proof of Records; Records of public officials: see 16 A.R.S. Rules of Civil

Procedure, Rule 44(a).

ARIZONA CASES

State v. Stone, 122 Ariz. 304, 594 P.2d 558 (App. 1979). "Since an original minute entry would have been admissible, the certified copy of' the May 21 minute entry was properly admissible pursuant to Rules of Evidence, Rules 902(4) and 1005,"

OTHER JURISDICTIONS

United States v. Ruffin, 575 F.2d 346 (2nd Cir. 1978). Copy must be admissible on some other grounds, only specific that under certain conditions, copies can be introduced.

RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs will cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Comment

This rule is not intended to change foundation requirements for summaries. The person creating a summary will ordinarily be required to lay the foundation and be available for cross-examination.

Source: Federal Rules of Evidence, Rule 1006.

ARIZONA CASES

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 267-78, 92 P.3d 882, 897-98 (App. 2004). Purpose of rule allowing witness to summarize information contained in voluminous records is to give parties an opportunity to detect and prepare for inaccurate summaries.

John C. Lincoln Hosp. and Health Corp. v. Maricopa County, 208 Ariz. 532, 543, 96 P.3d 530, 541 (App. 2004). In private hospitals' action seeking reimbursement from county for emergency medical treatment rendered to indigent patients, hospitals' summary exhibit accurately represented documents at issue; exhibit contained 100,000 supporting documents, providing basis for hospitals' summary statements, of which majority were extracted from the county and hospitals' files.

Rayner v. Stauffer Chemical Co., 120 Ariz. 328, 333-34, 585 P.2d 1240, 1245-46 (App. 1978). Witness may summarize information contained in voluminous reports or records as long as information contained in documents would be admissible and documents are made available to opposing party for inspection.

OTHER JURISDICTIONS

United States v. Evans, 572 F.2d 455 (5th Cir. 1978). Proper for government agent to testify about his analysis.

United States v. Denton, 556 F.2d 811 (6th Cir. 1977). Composite tape of excerpts from original wiretap tapes properly admitted into evidence despite objection originals would be better -- saved court time, no objection they were unfair or not authentic.

United States v. Smyth, 556 F.2d 1179 (5th Cir. 1977). Summaries are admissible as evidence under this rule; better practice is to give an instruction that explanatory parts are not evidence.

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Source: Federal Rules of Evidence, Rule 1007.

RULE 1008. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provision of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Source: Federal Rules of Evidence, Rule 1008.

ARIZONA CASES

State v. Silva, 137 Ariz. 339, 342, 670 P.2d 737, 740 (App. 1983). A part of a deceased police officer's report pertaining to chain of custody was allowed to be shown to the court to determine admissibility.

ARTICLE XI. MISCELLANEOUS RULES

RULE 1101. APPLICABILITY OF RULES

(A) Courts and magistrates. These rules apply to all courts of the state and to magistrates, and court commissioners and justices of the peace, masters and referees in actions, cases, and proceedings and to the extent hereinafter set forth. the terms "judge" and "court" in these rules include magistrates, court commissioners and justices of the peace.

(B) Proceedings generally. These rules apply generally to civil actions and proceedings, to contempt proceedings except those in which the court may act summarily, and to criminal cases and proceedings except as otherwise provided in the arizona rules of criminal procedure.

(C) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(D) Rules inapplicable. The rules (other than with respect to privileges) do not apply to proceedings before grand juries.

Comment

Federal Rules 1101 has been supplanted by one which conforms to Arizona state practice. See also Rule 19.3, Arizona Rules of Criminal Procedure.

Source: Federal Rules of Evidence, Rule 1101, (modified).

ARIZONA CASES

State ex rel. Woods v. Filler, 169 Ariz. 224, 228, 818 P.2d 209, 213 (App. 1991). Rule 1101 states that the Rules apply to civil actions.

State v. Tulipane, 122 Ariz. 557, 596 P.2d 695 (1979). Rule makes Rules of Evidence applicable to all criminal proceedings, here probation revocation Rule 27.7(b)(3) reliable hearsay must be 803(24) or 804.(b)(5) equivalent.

RULE 1102. AMENDMENTS

Deleted

RULE 1103. TITLE

These rules may be known and cited as the Arizona Rules of Evidence.

Source: Federal Rules of Evidence, Rule 1103, (modified).